Supreme Court, U.S.
FILED

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No.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

WALTHER VON GRABE,

PETITIONER

- against -

ZIFF DAVIS PUBLISHING CO.,
ZIFF COMMUNICATIONS CO.,
WILLIAM B. ZIFF, JR.,
DIRK EDWARD ZIFF,
ROBERT DAVID ZIFF,
PHILLIP B.KORSANT,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Where District Court denied plaintiff his right to conduct discovery, does the conversion of a motion to dismiss into one for summary judgement without notice, for failure to present evidence, violate the Due Process clause of the XIV. Amendment to the United States Constitution,

2. Where the parties selected German law in the settlement agreement in dispute and the center of gravity is located in Germany, does the District Court´s arbitrary selection of New York law instead of German law violate the Full Faith and Credit Clause, Section 1; the Privilege and Immunities Clause, Section 2, of Article IV; the Due Process Clause of the XIV Amendment to and the Equal Protection Clause of the United States Constitution.

3. Where District Court denied petitioner discovery and applied New York law despite the parties´ selection of German law, does a dismissal with prejudice for failure to present evidence violate the due process clause of Article 103 of the Constitution of the Federal Republic of Germany, where such summary judgement amounts to res judicata in the view of German courts thereby preventing petitioner to continue from litigating a pending action or refiling an action in Germany?

4. Is it a denial of due process under the XIV. Amendment to the Constitution, where the judge of the District Court instructs the parties that it is premature to plead matters of conflict of law and thereafter, without warning nor remedy, applies New York law, where under New York law, as seen by the lower courts, extortion is no defense to a release, while under German Civil Code (BGB) §§ 123, 134, or §138 a threat with any disadvantage to the victim suffices to void the release?

5. Is it an abuse of discretion and in conflict with the Right to Jury Trial provision of the VII Amendment, and in conflict with the XIV Amendment to the U.S. Constitution, where the District Court at the summary judgement stage substitutes speculation for evidence, then weighs it to determine the outcome of the case?

6. Does the District Court abuse its discretionary power by rewriting a contract contrary to the intent of the parties absent compelling reason?

7. Does the dismissal of this action with prejudice based upon a foreign pro se petitioner´s lack of understanding of Federal Rules of Civil Procedure violate the Excessive Punishment clause of the VIII. Amendment to the Constitution of the United States?

8. (a) Is an extorted release a defense to a claim?

(b) Is a threat improper where the threat i) leads to heart attack of victim, ii) was made with intent to enrich, and iii) itself is a crime and constitutes extortion under § 253 StGB (Germany´s Criminal Code); under New York´s Penal Code § 155.40, under 18 USC §§ 871, 1951, 1952, and in light of Restatement of Contracts (2nd) §§ 175, 176?

(c) Does the mere availability of a legal remedy sanction an extorted release, even though it does not provide relief to the victim in his circumstances?

(d) Is a pro se lawsuit, with an average life expectancy of six to ten years, to be filed from foreign soil by a foreign plaintiff, without the benefit of legal counsel knowledgeable in US law, a reasonable, immediate and present remedy to an immediate and present threat, combined with an immediate and present seizure of petitioners property, where a heart attack of the victim is imminent?

(e) Does the release of one tortfeasor release all others in light of Restatement of Torts, 2nd, § 885, or in light of New York´s Obligation Law § 15-108?

(f) Does the release of a corporation release its owners, who were wrongfully acting through it, using it as alter ego, comingling funds and identities for their personal benefit?

9. (a) Did petitioner have standing to sue in Florida under Florida statutes s 48.193 (1)(a) and (2) and s 48.181 (3), where respondents are licensed to do business and operate a branch office in state, and for over ten years have brought their magazines into the stream of commerce of Florida through wholesalers and distributors?

(b) Where respondents, acting wrongfully in Germany, are subject to German law, should not German law govern as to the question of extortionate conduct in light of Florida's (and New York's) lex loci doctrines?

10. (a) Do Germany's extortion statute, § 253 StGB (Strafgesetzbuch [German Criminal Code]), Florida's statute s 836.05 (Extortion, Threat), and New York's Penal Code §§155.30, 155.40 (Grand Larceny by Extortion), fall under the state statutes defined in 18 USC § 1961 (1)(A)?

(b) Can civil litigants recover under 18 USC § 1964 where injury was result of pattern of violations involving 18 USC §§ 1341, 1343, 1951, 1952?

11. Where petitioner's choice of German law is denied, does he, the victim of extortion, have a remedy against the tort of extortion in Federal Court under federal common law, Florida law, or New York law?

12. Where there are genuine questions of law and fact unresolved, should the Court of Appeals dismiss petitioner's appeal as frivolous?

PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption on the cover page.

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CONSTITUTIONAL STATUTORY, REGULATORY AND OTHER PROVISIONS INVOLVED

United States Constitution, Article IV:

Section 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

Section 2: The Citizen of each State shall be entitled to all Pri - vileges and Immunities of Citizen in the several States.

United States Constitution, VII. Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be pre - served, and no fact tried by a jury, shall be otherwise reexa - mined in any Court of he United States, than according to the Rules of common law.

United States Constitution, VIII. Amendment:

Excessive bail shall not be required, nor excessive fines impo - sed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV, Section 1:

...

No State shall make or enforce any law which shall abridge the Privileges or Immunities of Citizen of the United States; nor shall any State deprive any person of life, liberty, or pro - perty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America (October 29, 1954), Article VI:

1. Nationals and companies of either Party shall be accor - ded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.

Constitution of the Federal Republic of Germany, Article 103:

Before a Court everybody has the right to due process.

Florida Statute s 48.181 :

...

(3) Any person, firm, or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers, or distributors to any person, firm, or corporation in this state is conclusively presumed to be both engaged in substantial and not isolated activities within this state and operating, conducting, enganging in, or carrying on a business venture in this state.

Florida Statute s 48.193:

...

(2) A defendant who is engaged in substantial and not isolated activitiy within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

Florida Statute s 836.05. Threats, Extortion:

Whoever, either verbally or by written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person or property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his will, shall be guilty of a felony of the second degree, punishable as provided in s 775.082, s 775,083, or s 775.084.

New York Penal Law § 155.40. Grand larceny in the frist degree:

A person is guilty of grand larceny in the first degree when he steals property and when the property, regardless of its natu - re and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will (a) cause physical injury to some person in the future, or (b) cause damage to property, or (c) use or abuse his position as a public servant by engaging in conduct within or related to his offici - al duties, or by failing or refusing to perform an official duty, in such a manner as to affect some person adversely.
Grand larceny in the first degree is a class C felony.

New York Statute: General Obligation Law, § 15-108:

(a) Effect of release of or covenant not to sue tortfeasor. When a release or a covenant not to sue or not to enforce a judgement is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liabili - ty for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equi - table share of the damages under articly fourteen of the civil practice law and rules, whichever is the greatest.

Restatements of Torts, 2nd, § 885:

(1) A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them.

Restatements of Torts, 2nd, § 892B:

***

(3) Consent is not effective if it is given under duress.

Restatement of Contracts, 2nd, § 175 (1):

(a) Where a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Restatement of Contracts, 2nd, § 176 (1)

(B) A threat is improper if what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property.

Restatement of Contracts, 2nd, § 176 (2):

(C) A threat is improper if the resulting exchange is not on fair terms, and (a) the threatened act would harm the resipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends.

Restatement of Conflict of Laws, 2nd, § 145:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residentce, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement of Conflict of Laws, 2nd, § 147:

In an action for an injury to land or other tangible thing, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence, the thing and the parties, in which event the local law of the other state will apply.

Restatement of Conflict of Laws, 2nd, § 148:

(1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action took place in the state where the false representation were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence and the parties, in which event the local law of the other state will apply.

(2) When the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:

(a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,

(b) the place where the plaintiff received the representations,

(c) the place where the defendant made the representations,

(d) the domicil, residence, nationality, place of incorporation and place of business of the parties,

(e) the place where the tangible thing which is the subject of the transaction between the parties was situated at the time, and

(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false

representations of the defendant.

Restatement of Conflict of Laws, 2nd, § 159:

(1) The law selected by application of the rule of §145 determines whether the actor owed a duty to the injured person and whether this duty was violated.

(2) The applicable law will usually be the local law of the state where the injury occurred.

Restatement of Conflict of Laws, 2nd, § 160:

(1) The law selected by application of the rule of §145 determines whether an act or ommission is the legal cause of an injury.

(2) The applicable law will usually be the local law of the state where the injury occurred.

Strafgesetzbuch [German Criminal Code] §253 Translation:

(1) Whoever unlawfully forces another by physical force or threat of harm to do, tolerate or refrain from doing any act against his will, causing a loss to the property of the victim or a third party, and thereby unjustly enriches himself or a third party, will be punished with imprisonment of up to five years or with a fine, in especially severe cases with imprisonment not under one year.

(2) The act is unlawful if the application of force or threat for the intended purpose is considered to be reprehensible.

(3) The attempt is punishable.

Bürgerliches Gesetzbuch[1] [German Civil Code] §123 Translation:

1Whoever, by deception or unlawful threat, has been compelled to agree to a declaration can repudiate that declaration.

*2****

[1]The text of the BGB was translated from Beck'sche Kurzkommentare, **Palandt** Bürgerliches Gesetzbuch, Verlag C.H.Beck München ISBN 3 406 400450 (1996)

Bürgerliches Gesetzbuch [German Civil Code] §134 Translation:
A legal transaction is void if it is in violation of a law.

Bürgerliches Gesetzbuch [German Civil Code] §138 Translation:
1A legal transaction which violates fair standards of dealings [boni mores] is void.
*2Void is especially a legal transaction wherby a person, through exploitation of duress, *** obtains a capital gain for himself or a third party, which is in obvious disproportion to his performance.*

Bürgerliches Gesetzbuch [German Civil Code] §812 Translation:
*1Who by performance of another or by other means obtains something at the others expense is obligated to return it to him. ****
2Performance includes the recognition of the existence or non-existence of a debt relationship.

Bürgerliches Gesetzbuch [German Civil Code] §818 Translation:
*1The extent of the obligation for restitution includes the benefits [profits] obtained ****
*2****
*3****
*4****

Bürgerliches Gesetzbuch [German Civil Code] §823 Translation:
1Who unlawfully with intent or by negligence damages life, body, health, freedom, property or other rights of another is obligated to the other for restitution of the damages sustained.
*2****

Bürgerliches Gesetzbuch [German Civil Code] §852 Translation:
(I) Statutes of Limitation ...
(II) ...
(III) A person, liable for restitution, who has obtained something at the expense of the victim, is obligated to return the same according to the Rules of Unjust Enrichment even after the statutes have run.

Bürgerliches Gesetzbuch [German Civil Code] §990 Translation:

The possessor is liable to the owner under §§987, 989 if he, at the time of taking possession of the property, acted not in good faith.

Bürgerliches Gesetzbuch [German Civil Code] §992 Translation:

The possessor is liable to the owner according to the rules of restitution for unlawful actions, if he obtained property ... by a crime.

Bürgerliches Gesetzbuch [German Civil Code] §612a Translation:

An employer may not prejudice an employee in an agreement or a measure because he exercises his rights in a permissible form.

United States Code, Title 18, § 1341 Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of fals or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

United States Code, Title 18, § 1343 Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such a scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

United States Code, Title 18, § 1951 Interference with commerce by threats or violence

a) *Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.*

(b) As used in this section -

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear or injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce with the District of Columbia, or any Territory or Possession of the United States,

all commerce between any point in a State, Territory, Posses - sion, or the District of Columbia and any point outside there - of; all commerce between points within the same State through any place outside such State; and all other commer - ce over which the United States has jurisdiction.

*(c) ***.*

United States Code, Title 18, § 1952 Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) *Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to-*

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facili - tate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraph (1),(2), and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, ot both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Sub - stances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section shall be con - ducted under the supervision of the Secretary of the Treasury.

United States Code, Title 18, § 1961 Definitions

As used in this chapter-

(1) "racketeering activity" means (A) any act or threat invol -

ving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment of more than one year; (B) any act which is indictable under any of the following provisions of title 18 United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 474, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 644 (relating to embezzlement from pension and welfare funds); section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmissi - on of gambling information), ***section1341 (relating to mail fraud), section 1343 (relating to wire fraud),*** *section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (rela - ting to the obstruction of State or local law enforcement),* ***sec - tion 1951 (relating to interference with commerce,*** *rob - bery, or extortion),* ***section 1952 (relating to racketee - ring),*** *section 1953* ***

(C) ***

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof;

(3) "person" includes any individual or entity capable of hol - ding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corpo - ration, association, or legal entity, and any union or group of individuals associated in fact, although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effec - tive date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means ***

*(7) ****

*(8) ****

*(9) ****

*(10) ****

United States Code, Title 18, § 1962 Prohibited Activites

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racke - teering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in any acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or for - eign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of con - trolling or participating in the control of the issuer , or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accom - plices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activi - ties of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or asso - ciated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enter - prises´s affairs through a pattern of racketeering activity or collection of an unlawful debt.

(d) it shall be unlawful for any person to conspire to violate any of the provisions of subsections (a),(b), or (c) of this section.

United States Code, Title 18, § 1964 Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endavour as the enterprise engaged in, the activities of which affect interstate or foreign commercce; or ordering dissolution or reorganization of any enterprise; making due provisions for the rights of innocent persons.

*(b) ****

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

*(d) A final judgement or decree rendered in favor of the United States ****

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

WALTHER VON GRABE,

PETITIONER

- against -

ZIFF DAVIS PUBLISHING CO,
ZIFF COMMUNICATIONS CO.,
WILLIAM B. ZIFF, JR.,
DIRK EDWARD ZIFF,
ROBERT DAVID ZIFF,
PHILLIP B.KORSANT,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgement and opinions of the lower courts.

Opinions below

To the best of the knowledge of petitioner neither the decision of the District Court nor the decision of the Court of Appeals have been published and therefore are reprinted in the Appendices hereto:

ORDER DENYING MOTION FOR TRO A-1 . . . A-8
ORDER DENYING DISCOVERY A-9
ORDER CONVERTING MOTION TO DISMISS A-10 . . . A-24
ORDER DISMISSING APPEAL A-25
ORDER DENYING PETITION FOR REHEARING A-26

JURISDICTIONAL STATEMENT

This action was filed in the District Court for the Middle District of Florida and based in part upon diversity and in part upon statute.

The case was transferred to the Southern District of New York.

It was dismissed on November 20, 1995.

A timely appeal was filed with the Court of Appeals for the 2nd District.

The final judgement of the Court of Appeals for the 2nd Circuit was entered on May 22nd, 1996.

A timely Petition for Rehearing was filed on May 30, 1996.

On August 23, 1996 the Petition for Rehearing was denied.

This Court has jurisdiction to review the judgement of the Court of Appeals pursuant to 28 USC § 1254(1).

Preleminary Statement

This case was filed for recovery of damage, sustained from respondents´ wrongful actions, perpetrated in Germany. Petitioner alleges that respondents fraudulently entered into a contract to sell his family´s publishing company Redwood Press Verlag GmbH (**Redwood**) to respondents Ziff Communications Company (**ZCC**) and Ziff Davis Publishing Company (**ZDP**) and expand it to enable the production of respondents´ magazines in Europe. Petitioner in reliance upon such promise did transfer and expand his publishing company to respondents specifications. The corporation transferred, however, ended up in the hands of the individual respondents, not the corporate respondents, as contracted[1].

Moreover, upon petioner´s performance, respondents refused to pay, and by withholding all funds, then due to petitioner and other oppressive threats and manipulative tactics, extorted from petitioner his unvoluntary consent to a release, immediately repudiated by petitioner[3]. Respondents´ threats were so severe that petitioner suffered a heart attack requiring open heart surgery[2], and was left bankrupt, with liabilities exceeding his assets, including tax liabilities to the Federal Republic of Germany, foremost caused by this transaction, in an amount of approx. $300,000. While respondents sold petitioner´s company to a third party for in excess of $ 100 Million, petitioner, due to respondents´ actions, was unable to pay for an attorney and had to file this action pro se in Federal District Court from abroad since the corporate respondents at the time had insufficient presence for German courts to exercise in personam jurisdiction.

Legal Actions

In or about **May 15, 1991** an action was filed before the Labor Court Munich (Arbeitsgericht) against Ziff V erlag GmbH (Ziff Verlag), not a party to this action, dealing exclusively with

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[1]**Exhibit A-27, translation A-29**, Minutes of Stockholder Meeting of Ziff Verlag GmbH, annexed as Exhibit F to the original complaint

[2]The correlation between mental anguish and cardiac events is a fact which has been scientifically proven (for an extensive bibliography see **Journal of the American Medical-Association** [JAMA]; Jiang et al; Stress-Induced Myo-Cardial Ischemia and Cardiac Events, Vol. 275, No. 21, June 5, 1996 (**Exhibit 8**)).

[3]**Exhibit 2** Respondents 1st Motion to Dismiss

the issue of wrongful termination of employment by Ziff Verlag under Germany´s Termination of Employment Act, controlling the termination of employees, including elderly employees.

That action was settled, as to the wrongful termination issue, by the Termination Agreement between Ziff Verlag and petitioner (but is pending as to the issue of the inclusion of the extorted release, unrelated to the labor relationship). Ziff Verlag, according to the termination agreement, paid petitoner an amount of approx. $17,000 as compensation for the loss of his employment under the German Termination of Employment Act and applicable German Tax Law (Exhibit A-23 ¶1.2).

In **June 24, 1991** this pro se action was filed from abroad without the benefit of legal counsel, knowleadgable in US law, in the Federal District Court for the Middle District of Florida. However, that action was transferred over the objection of petitioner to the Southern District of New Y ork for the convenience of defen - dants under Section 1404(a) FRCP.

In the Southern District of New York, the case was essentially dormant. The Clerk of the District Court refused to issue a summons and the District Court, for over three years, ignored two motions to compel the clerk to issue a summons, and left unanswered letters and transatlantic telephone calls by petitioner (*Civil Dockets of the U.S.District Court for the Middle District*, Entry dated **8/7/91**; Civil Dockets SDNY, Entry dated **10/11/94**) asking for resolution. It was only after petitioner moved to the United States and amended his complaint that the District Court finally scheduled a pre-trial conference and petitioner could effect service upon respondent.

In or about **October of 1994** petitioner moved the District Court to issue a Temporary Restraining Order restraining respondents from selling the evidence in this case to third parties.

That motion was denied on **December 28. 1994**. In its order, denying petitioner´s motion for a TRO, the District Court advised the parties, 1) that the case needed a more fully developed record; 2) that it was premature to argue matters of choice of law[4].

In or about **February 1995**, petitioner moved the lower

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[4]**Exhibit A-1 at A-6 n4**: *Although it is unclear at this stage which law will govern this issue, the law of New York and Florida, as well as the federal common law are similar in their requirements for a showing of duress. As such, it is unnecessary at this stage to resol - ve the choice of law question.*

court to allow discovery before filing of respondents´ answer to the complaint.

The District Court, on **March 9, 1995**, however, ordered petitioner´s discovery stayed, (Exhibit A-9) pending respondents´ motion to dismiss.

Shortly thereafter respondents filed their Motion to Dismiss.

On **October 9, 1995** (Exhibit A-30) and **October 12, 1995** (Exhibit A-32), petitioner, in letters suggested to the court that German law may be applicable. On October 12, 1996 petitioner advised the court further that in violation of the court´s order to stay discovery he had obtained evidence from the hospital treating him for a heart attack brought on by petitioners´ violent threats (Exhibit 6).

On **November 20, 1995**, the lower court without notice converted respondents´ motion to dismiss sua sponte into one for summary judgement and dismissed this case with prejudice (Exhibit A-10 through A-24) on the grounds that petitioner had not presented evidence to support his claims.

Furthermore, while in its Memorandum, Opinion and Order, dated **December 28, 1994**, the Court had advised the parties that it was premature to argue matters of choice of law , the District Court, in its *Opinion and Order* of **November 20, 1995**, applied New York law on the grounds that the parties had not pleaded otherwise.

Petitioner appealed in forma pauperis, however, on **May 15, 1996** paid the appeals fee.

On **May 22, 1996** the Court of Appeals rejected petitioner´s appeal as frivolous within the meaning of 28 USC § 1915(d), pointing to Neitzke v. Williams, 490 U.S. 319 (1989) (Exhibit A-25).

Petitioner filed a timely petition for reconsideration but that petition was denied on **August 23, 1996** (Exhibit 10).

Lis Pendens

On **March 5, 1996** petitioner moved the Labor Court (Arbeitsgericht) Munich/Germany to reopen the case and to declare the inclusion of a release, unrelated to a labor relationship, into a termination agreement to an employment contract void. The original complaint was filed in June of 1991.

That action is pending.

In or about **June 1996** petitioner learned that Ziff Verlag had been transferred from the ownership of the individual respondents into the ownership of the corporate respondents, thus establishing sufficient presence of the corporations to exercise in personam jurisdiction by a German court.

Therefore, on **October 14, 1996** petitioner joined the corporate respondents Ziff Communications Company and Ziff Davis Publishing Company in the Labor Court case against Ziff Verlag.

Other matters related to petitioners action

The District Attorney in Munich/Germany (File number 267 Js 221655/96) on August 1, 1996 began a criminal investigation against William B. Ziff, one of the individual respondents, and his agents Eric Hippeau, J. Malcolm Morris, and Helmut Kunkel for fraud and extortion.

REASONS FOR GRANTING THIS WRIT

This petition is respectfully submitted for consideration; it should be granted for the following reasons:

I. DENIAL OF DUE PROCESS

A. Denial of Discovery and Dismissal for Failure to Present Evidence

The District Court, with reference to the Supreme Court's Summary Judgement Trilogy Anderson v. Liberty Lobby 477 US 242 (1986); Celotex Corp. v. Catrett 477 US 316 (1986); and Matsushita Electric Industrial Co. v. Zenith Radio Corp. 475 US 572 (1986), abused its discretionary power **by prohibiting** petitioner **to conduct discovery** so as to thereafter convert a motion to dismiss into one for summary judgement with prejudice **for failure to present evidence** (Exhibit A-15 ¶1)

While not specifically ruling on that issue, it appears from repeated references included in Anderson and Celotex that this Court in fact meant to say the opposite, i.e. that summary judgement should only be granted after the non-moving party has had the opportunity to fully conduct discovery as provided by the FRCP.

In Anderson, for example, this Court held that *'the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgement. This is true even where the evidence is likely to be within the possession of the defendant,* ***as long as the plaintiff has had a full opportunity to conduct discovery*** (emphasis supplied), Anderson, ibid, at 257.

In Celotex, ibid. at 322, the Court holds: *'In our view, the plain language of Rule 56(c) mandates the entry of summary judgement,* ***after adequate time for discovery*** ****'.*

Thus, it appears that the right to conduct discovery and thereby adduce evidence in support of a plaintiff's claims and in defense of a motion to dismiss is a fundamental right which has been recognized by this Court.

The reasoning of the District Court in its Summary Judgement (Exhibit A-15 last ¶ 1), i.e. that petitioner failed to present evidence, is in violation of principles of logic, if not of well established law :

WHERE A COURT PREVENTS A PARTY FROM OBTAINING THE EVIDENCE REQUIRED BY DISALLOWING DISCOVERY IT CANNOT LATER BASE SUMMARY JUDGEMENT ON FACT THAT SUCH EVIDENCE HAS NOT BEEN PRESENTED.

B. Notice of Conversion of Motion to Dismiss into one for Summary Judgement

The District Court surprised petitioner with its sua sponte conversion of a motion to dismiss into one for summary judgement with prejudice **without giving notice,** as required by Rule 56(c) FRCP. In dismissing this action **with prejudice** it may have denied petitioner the opportunity to continue prosecution of a pending action before a German court.

Petitioner respectfully suggests that Rule 56 (c) FRCP in a clear and unambiguous language prescribes a minimum period of notice of ten days and therefore that giving notice is mandatory where the conversion of a motion to dismiss is being considered. Petitioner is a European and accustomed to the principle that the law is binding not only on the citizen but also on the courts, and he could not possibly have expected that the district court would ignore the law as it is written. The purpose of notice is among others to give the non-moving party the opportunity to oppose it.

Apparently petitioner is not alone in his contention. Petitioner relies on Georgia S.&.F.R.Co v. Atlantic C.L.R.Co (CA5 Fla) 373 F2d 493 (1967) cert den 389 US 851; Johnson v. RAC Corp. (CA4 Md) 491 F2d 510 (1974); Ailshire v. Darnell (CA8 Mo) 508 F2d 526 (1974); Schwartz v. Commonwealth Land Title Inc. Co (EDPa) 374 FSupp 564, (1974); Hickey v. Arkla Industries Inc (CA5 Tex) 615 F2d 239 (1980); Re Bristol Industries Corp (CA2 Conn) 690 F2d 26 (1982); Beacon Enterprises v. Menzies (CA2) 715 F2d 757,767 (1983) Estate of Smith v. Tarrant County Hospital Distr. (CA5 Tex) 691 F2d 207, (1982); In re. G.&.A. Books 770 F2d 288, 294-295; Groden v. Random House (CA2) 61 F2d 1045, 1047 (1995).

Thus, the notice requirement is well established law and it appears that the District Court has little, if any, lattitude to apply or ignore a law, which was mandated by Congress, as it pleases.

C. Denial of Trial by Jury

Petitioner repeatedly submitted in sworn affidavits and/or pleadings, certified under Rule 11, Sentence 5, that petitioner was threatened by respondents or their agents with harm to his property and that respondents´ threat was so severe that petitioner suffered from increasingly excruciating chest pains during negotiations with respondents, and that the conduct of respondents finally lead to his heart attack. On October 13, 1995 (Exhibit A-35), petitioner advised the District Court that he had obtained evidence from the hospital, treating petitioner for his heart attack. Notwithstanding the foregoing, the Judge of the District Court **speculated** that petitioner "apparently conflated his extortion claims" (Exhibit A-20 n8) and dismissed this action with prejudice.

However, it is not for the Judge to speculate on the evidence at the summary judgement stage and to substitute speculation for sworn affidavits and certified pleadings. The judge´s speculation, here again, is in conflict with the laws of logic: A heart attack cannot be conflated, it is a near death event. Where the behaviour of one party leads to it, that behaviour is by definition beyond what is an acceptable standard of fair dealings in the trade or otherwise, and petitioner, as the victim of extortion, has a claim for recovery of damages under the laws of the United States or under German law , where extortion still is a serious crime.

The substitution of speculation for facts, properly submitted by petitioner, with subsequent dismissal with prejudice is in conflict with the Right to Trial by Jury provision of the VII Amendment to the United States Constitution.

Petitioner is mindful of the fact that the errors referred to above may be harmless if there is no case behind the lawsuit. The claim here is that respondents unlawfully and unjustly enriched themselves at the tune of $ 100 Mio at the expense of petitioner who was left bankrupt and permanently ill by respondents´ actions and the crux of this case is the question whether a release, obtained by extortion so severe that it caused the victim´s heart attack, with simultaneous seizure of petitioner´s property, is nevertheless valid.

Apparently, the outcome depends largely on the law to be applied. Petitioner, therefore, will address this issue next.

II. VENUE

Petitioner filed in the Middle District of Florida in reliance upon Florida´s long-arm statutes, where respondents were doing business by selling their products through wholesalers and distributors in Florida for a period of over ten years and maintained a branch office in the state (Exhibit A-44). The courts below, denying argument on that issue (see infra page 11) however, ruled that petitioner, who maintained an office in Florida at the time, had no standing to sue respondents in the State of Florida and therefore it would assume New York law as basis for this action (Exhibit A-17).

The District Court´s ruling is in conflict with International Shoe Co. v. Washington, 114 So.2d 436 (D.C.A.1st FL 1959) and Erie Railroad v. Tomkins, *304 US 64 (1938)*. Under Erie the District Court should have applied state standards (i.e. the law of the place where the action was filed, not the one of the forum state) in determining whether petitioner´s filing in the Middle District of Florida was proper and should have ruled as the Supreme Court of the State of Florida would have under Florida´s long-arm Statutes s 48.193 (1)(a) and (2) and s 48.181 (3) see pages xiv, xv.

Under International Shoe, a claim is actionable in any

state where the defendant has more than minimum contacts. Thus, petitioner properly filed his action in the Middle District of Florida and the District Court´s ruling is in error as a matter of law.

However, though Florida law is applicable here, under Florida´s lex loci doctrine, respondents´ **conduct** has to be seen under the law of the place where the conduct occurred.

III. CONFLICT OF LAW

Petitioner when dealing with respondents in Germany, relied on German law as basis for his performance.

Petitioner is a German national with residence at the time of filing in Germany; the promise of compensation as part of a bargain was received in Germany; the performance of petitioner took place in Germany; the corporation sold to respondents is located and registered in Germany and was transferred to defendants under German law; the release was extorted by respondents in Germany by a German agent acting for respondents; the impact of respondents´ actions was felt in Germany; and Germany, footing welfare expenditures for petitioner who has become destitute through respondents´ actions, has the greatest interest in the outcome of this case; while the State of New York has no interest in preventing prosecution of respondents.

Furthermore, the parties had expressly agreed to the application of German law in ¶ 13.3 of the Employment Contract (Exhibit A-42/43) and subsequently applied German law in ¶ 1.2 of the Termination Agreement (Exhibit A-23) terminating the employment relationship. Finally, as have the United States, Germany has a vested interest in protecting its citizen from crimes, including from the dramatic rise of crimes committed by foreigners[8] infra page 16.

This case presents a true conflict of law.

Under German law a release is void, not voidable, where it was obtained in violation of a law (§134 BGB) such as by fraud or threat (§138 BGB) whereby a threat with any disadvantage to the victim suffices (RG 60, 373; BGB 25,218)[10,11] infra page 18.

Alternatively, the victim of a threat can choose to repudiate

[5] Translations of German law provided have been translated by petitioner, who is fluent both in German and English, to the best of his knowledge and belief. They are submitted under Rule 11, sentence 5. Petitioner is willing to have an expert of the German Embassy testify as to the correctness of the translations.

his declaration of will (§123 BGB repudiation of declaration obtained by fraud or threat). Threat and fraud in itself constitute unlawful conducts (Unerlaubte Handlungen) under German law, here making the declaration of will void, not voidable, and making respondents possessors in delicto (§992 BGB) resp. possessors in bad faith (§990 BGB), and petitioner, absent payment under the purchase agreement, is entitled to demand return of the property (§§ 852 (III), 812 BGB), and all profits and benefits derived from its operation or the possession by respondents (§818 BGB)[5] (see also Recovery under German Law[infra p16]).

In turn, under New York law, as seen by the District Court, even a threat, severe enough to trigger a heart attack, is apparently insufficient to void an extorted release, though that decision is in conflict with Weiner v. Teleking Corp, Supr.Ct Kings County, 123 N.Y.S.2d 101 (1953); Gallagher Switchboard Corp. v. Heckler Electric Comp, 229 N.Y.S.2d 623 (1962); Austin Instrument, Inc. v. Loral Corporation, CANY 272 N.E.2d 533 (1971).

The District Court, while converting respondents´ motion to dismiss into one for summary judgement, citing New York´s center of gravity rule, held that lex loci did not apply since the parties did not plead such (at A-18 ¶ 1). However, the District Court itself, in an opinion rendered earlier (Exhibit A-6 n4), had instructed the parties that it was premature to argue choice of law questions .[4] [infra page 4] Both petitioner and respondents have relied on that instruction wherefore petitioner, in his answer to respondents´ motion to dismiss, did not specifically address conflict of law issues.

Moreover, there is no federal or New York statutory law requiring the pleading of foreign law during the early pre-trial stage, i.e. before evidence in support of pleadings, claiming the applicability of foreign law, has been adduced during discovery.

In addition, in letters, dated October 9 and 12, 1996 (Exhibits A-30...31, A-32...33), petitioner advised the judge that German law may apply.

Furthermore, New York statutory law does not mandate dismissal of an action with prejudice for failure to plead applicability of foreign law.

Finally, while ruling that, where all wrongful actions, forming the basis of petitioner´s claims, were executed by respondents in Germany, New York law, not Florida law and not German law applied, it not only denied even a minimum of comity to the German judiciary but by dismissing this case **with prejudice**

actively interfered with an action currently pending before a German court, testing the validity of the release under German law. In so doing it also rewrote a contract between the parties, in which the parties had agreed that German law would be applied to all dealings connected to the labor relationship between Ziff Verlag and petitioner. The inclusion of the alleged release into the termination agreement, terminating the employment contract bet - ween Ziff Verlag and petitioner, makes German law applicable.

Petitioner vehemently disagrees with the lower court´s strategy to rewrite contracts in order to avoid application of foreign law: The parties intent is unambiguous (see Exhibit A-42 ¶13.3; A-23, ¶1.2) and the District Court oversteps its authority when manipulating the intent of the parties, cast into a contract, absent compelling reason.

Even if that were not so, it is well settled on the federal as well as on state level that the law of the place where the wrongful conduct occurred is applicable, unless it violated fundamental policies of the forum state.

Petitioner points to Erie Railroad Co. v. Tomkins 304 US 64 (1938), to Klaxon Co. v. Stenton Electric, 313 US 1020, and Restatement of Conflicts of Law (2nd) §§145 (1), 147, 148(1), (2) (b) (e).

While in Klaxon (ibid. at 1022), this Court ruled that the Full Faith and Credit clause does not go so far as to compel the District Court to apply foreign law *if such application would in - terfere with the local policy*, the District Court never even applied a state policy test, never mind asked the question where New York´s policy would collide with Germany.´s (Indeed it would not in light of New York´s Penal Code §155.40: both states abhorr extortion).

Even though, it found that New York´s policy was not in conflict with federal law. However, the issue here is not whether it is in conflict with federal policies but whether New York´s policy is in conflict with Germany´s interest in protecting its citizen from criminal actions of foreigners, keeping its citizen off its wellfare rolls, and guaranteeing its citizen a fair trial on the merits.

Under Klaxon, in other words, the conflict of law rules applied by the District Court must conform to the law applied by the state courts of the forum. Controlling (N.Y.) state court decisions are Autin v. Autin, (CANY) 124 N.E.2d 99 (1954); Neymeier v. Kuehner (CANY), 31 N.Y.2d 121 (1972), here applicable Rule 2, sentence 2; Cooney v. Osgood Machinery, Inc. (CANY), 595 N.Y.S.2d 919

(1993); and Padula v. Lilarn Properties (CANY), 84 N.Y.2d 519 (1994). On the federal level see O'Melveny v. Federal Deposit Insurance Corp., 114 S.Ct. 2048 (1994).

The gist of New York´s state decisions cannot be subject to interpretation, it is unambiguous: Where there exists a true conflict, the law of the place, where the wrongful conduct occurred, applies.

The District Court, in turn, in its Summary Judgement does a slalom course to avoid German law. However, no matter how skillful, no tinkering can overcome the truth of the matter: The parties selected the Law of the Federal Republic of Germany and such election should not be disturbed by the District Court since

ABSENT COMPELLING REASONS IT IS NOT FOR THE JUDGE TO REWRITE A CONTRACT AND LIGHTLY DISTURB ITS BASIS IN LAW.

IV. Excessive Punishment

As it appears, the District Court dismissed petitioner´s case on formal grounds, i.e. because in its opinion, petitioner should have known that it would convert respondents motion to dismiss into one for summary judgement. However, petitioner is accustomed to German principles of law and had not even a hint nor found any law or precedent which allowed the District Court to rewrite contracts to its liking; to entrap the parties by ruling at one stage of the proceedings that it was premature to argue choice of law and then fault them for not having argued such; to deny discovery and later dismiss an action for failure to present evidence; or to substitute its own speculation for facts; all of which in blatant disregard for well established law, contained in statutes, plain even to the most superficial reader.

In Germany it is well settled law that a court shall not surprise a party by issuing opinions at one stage of the procedure and in the next reverse itself without notice nor remedy to the parties. Such procedure is an unconstitutional denial of due process under German law. It should be viewed as such, here, too.

Thus, where the District Court punishes petitioner by dismissing his case "with prejudice" **for having relied on opinions rendered by it earlier**, it goes far beyond what can be justified as an appropriate response to what petitioner may have erroneously believed was expected from him.

A dismissal with prejudice is an extreme measure which interferes with a party's right to refile a complaint, for example in state court or before a court of law in Germany. Furthermore, in dismissing this case with prejudice, the District Court - never having heard the case on the merits - deprives the German Labor Court of its constitutional power to bring a case to trial in which the wrongful inclusion of a release into a termination agreement to an employement contract is tested.

It is petitioner's position that the District Court's excessive reaction violates fundamental principles of fairness, or - if this is too vague - is in conflict with Article VII of the United States Constitution. It is furthermore in stark conflict with Article 103 of the Constitution of the Federal Republic of Germany, where the result of such summary judgement (res judicata!) is felt in Germany.

V. Racketeering Claim

Petitioner filed a claim **under 18 USC §1964(c)** stemming from a pattern of violations of racketeering statutes, including 18 USC §§1341, 1343, 1951, and 1952.

The District Court ruled that civil litigants have no claim under 18 USC §1951, and that it had found no authority allowing civil litigants to file an action under racketeering statute §1952 (at A-22 ¶ 2).

Petitioner respectfully suggests that Sedima S.P.R.L v. Imrex 473 US 481 (1985) is sufficient authority. In Sedima this Court held (in general terms) that where the perpetrators obtain control of an enterprise by a pattern consisting of wire fraud [Section 1341], mail fraud [Section 1343] and by threat to the victim [Section1951], using interstate facilities [Section 1952] to further their goal, the victim has a claim under 18 USC §1964(c).

As is evident from public records, respondents have been involved (1) in misrepresentation by wire and mail in the case of CBS v. Ziff Communications Company in or about 1985, where they misrepresented the financial conditions of a group of magazines they sold to CBS. CBS' insurance company, as a result of such misrepresentation, has suffered a loss in an amount of approximately $ 6 Mio.[6] (2) Respondents furthermore defrauded Kahler, Bourne & Partner (**Kahler**), a Personnel Consulting firm[7], by misrepresenting by wire that they agreed to the terms of Kahler, who

had quoted an amount of DM 150,000 (about $100,000) for certain services. After they had obtained said services, they refused to pay. Thus, as is obvious, respondents show a pattern of racketeering activities, involving the same or a similar modus operandi, as required by Sedima and the lower courts erred in denying petitioner to litigate his RICO claims under 18 USC §1964 (c).

VI. Genuine Issues

Petitioner in sworn affidavits and pleadings, certified under Rule 11, sentence 5, has alleged that he delivered to respondents his publishing company in reliance upon a promise of fair payment, and that respondents refused to pay after petitioner had performed; that respondents extorted a release by threat so severe that it caused a heart attack of the victim; and finally that the individual respondents enriched themselves and not the corporate respondents by transferring Redwood into their ownership, instead of into the ownership of the corporations, a fact of public record.

Respondents in sworn affidavits and pleadings, submitted under Rule 11, sentence 5, admitted that (A) they promised fair payment for the delivery of petitioner´s publishing company, but that they "changed their mind" [after they had obtained control over petitioner´s company], and (B) that they "never believed that they owed anything to petitioner" [while in fact they continued their promises of fair compensation for the obvious purpose to fraudulently entice petitioner to transfer his publishing company to respondents], (C) that when threatening petitioner they were just "hard bargaining" and that petitioner "is not entitled to be free from threats", (D) that petitioner repudiated the release forthwith.

Thus, respondents directly or through able councel, admitted the facts alleged by petitioner for which reason petitioner is entitled to summary judgement, pending determination of damages by a jury.

Alternatively, **the remaining genuine issues of facts** are

(1) were respondents´ threats sufficiently severe to account for petitioner´s heart attack[8] infra p 16, thereby making the release

[6]Olsen, Walter K. The Litigation Explosion, Truman-Tally-Books Dutton (1991) ISBN 0-525-24911-7, page 52;

[7]Petitioner at all times material to the sale of his company was no longer a partner in the Kahler partnership which he relinquished to avoid a conflict of interest.

voidable under US law, resp. voiding the release under German law;

(2) did the remedies, available to petitioner, provide adequate relief;

(3) did petitioner repudiate the release in light of Exhibit A-37 ¶ 2;

(4) (a) did the parties agree to a release of the individual respondents in light of the fact that the individual respondents enriched themselves, applying threats and seizing property, by using the corporate respondents as alter ego, comingling funds and identities;

(b) are the individuals expressly included in the release as required by New York Obligation Law §15-108,

all of the foregoing being issues of facts which should be resolved by the jury;

The remaining issues of law are

(1) is a release, obtained by extortion and seizure of property, causing a heart attack in the victim, a defense against an otherwise valid claim;

(2) does petitioner have a claim for recovery from the tort of extortion under US or German law;

(3) is the absence of the individuals in the release prima facie evidence of the parties´ intent under § 15-108 N.Y.Obligation law;

(4) (a) does German law apply where the center of gravity is in Germany, and the parties had expressly agreed to apply German law;

(b) and if it does, is petitioner entitled to withdraw his declaration of will (§ 5 of the Termination Agreement) if he was threatened with a disadvantage (§§123, 134, 138 BGB).

In light of the foregoing, petitioner respectfully submits a discussion of genuine issues of facts or law.

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[8]Petitioner had repeatedly referred to the impact of respondents severe threats onto his health. The District Court ignored these pleadings.

[9]As have the United States of America, Germany has a vested interest in protecting its citizen from crimes committed by foreigners. According to public records, statistical data made available by the German Bundeskriminalamt [BKA, the German equivalent to the FBI] show that there has been a steady increase in criminal acts comitted by foreigners from 165705 in 1984 to 422846 (!) in 1995. Of all frauds committed in Germany in 1995, the percentage of frauds comitted by foreigners was 23.4%. Of 5114 crimes committed by citizen of the United States in Germany in 1995, fraud accounted for 791 cases.

A. Recovery under German law

Extortion under German law is punishable by imprisonment of more than one year (§ 253 Extortion StGB page xiv) and it should therefore fall into the classification provided by 18 USC § 1961 (1)(A), allowing the victim recovery under 18 USC § 1964.

However, should petitoner´s claims fail under federal racketeering statutes he should be allowed to prosecute his claims in federal court, sitting in diversity, under German law since it would be unconscionable to allow tortfeasors to evade prosecution for damages inflicted on foreign soil merely on the ground that they have insufficient presence in foreign courts to establish in personam jurisdiction, after they skipped the country ("hit & run"-crimes).[9] page 16

Restatement of Conflict of Laws (2nd), §145, clearly defines the general principles under which the law of the place where the wrongful conduct ocurred should apply, i.e. §145 (2)(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred; § 147 where the injury occurred; §148 (1)(a) the place *** where plaintiff acted in reliance upon defendant´s representations, (2) the place where plaintiff received the repre - sentations, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, or (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of defendant. The law selected by application of § 145 determines whether an act or omission is the legal cause of an injury.

Thus, the center of gravity is Germany. Moreover, as outlined before, the parties had agreed to apply German law in ¶13.3 of the Employment Contract (Exhibit A-43 [Exhibit S to the Original Complaint]) and accordingly have applied it in ¶1.2 of the Termination Agreement, as is evident from the appendix to the District Court´s Summary Judgement (Appendix A-23) and **the District Court, absent compelling reasons, abused its discretionary power by rewriting the contract contrary to the parties intention.**

The right of victims to recover from damages sustained by tortious, including criminal acts of tortfeasors, has been cast in great detail into Germany´s Civil Code.

Under German law, petitioner has a minimum of five remedies[5] supra p 10:

(1) He can repudiate his declaration of will (release) under §123 BGB see p xix. Respondents have admitted in their first motion to dismiss (Exhibit A-37 ¶2) that petitioner repudiated by refusing to sign a stipulation withdrawing this lawsuit against the corporate respondents;

(2) The release is void (not voidable) under §134see p xx since it was obtained by an act in violation of existing law, such as §253 StGBsee p xix, or §612a BGB,see p xxi and petitioner can recover under §823 BGBsee p xx, alternatively he can demand return of his property even after the statutes have run plus all profits and benefits derived by respondents from the operation of petitioner's property (§ 852 III BGB)see page xx;

(3) The release is void (not voidable) since it was obtained by acts in violation of boni mores (§138 BGB) and petitioner can recover under §823 BGBsee p xx;

(4) Under German law a sales contract is binding and the buyer is obligated to pay. Where he does not pay, the property is to be returned (§§852 III, 812see p xx in combination with one or more of the following §§ 990, 992see p xxi, 823see p xx BGB) regardless of whether the statutes of limitations have run.

(5) Under §§990 (possessor in bad faith), 992 (possessor in delicto) BGBsee p xxi, the possessor is obligated not only to return the property obtained in violation of a law or in bad faith but must turn over all benefits and profits derived from the operation or from the ownership of the property, §818 BGBp see xx.

[10]RG=Reichsgericht, Decisions of the Reichsgericht, Vol 60, page373

[11]BGH=Bundesgerichtshof, Decisions of the Bundesgerichtshof, Vol 25, p. 215, as cited in Palandt, Bürgerliches Gesetzbuch, 55. ed (1996), p 92 Commentary to §123 Contest of Declaration obtained by Fraud or Threat. See also RGSt (Reichsgericht, Criminal Division) 14, 265 and BGH as published in Neue Juristische Wochenschrift 66, 2399, as to third person administering the threat. Petitioner will supply copies and translations of pertinent citations upon demand by this Court.

B. Release

If a release is extorted, under Florida, New York or federal law it is voidable. Under German law , a release obtained under threat **is void** (§§ 134, 138 BGB). Under German statutory law as well as federal common law there need not even be extortion.

In Germany it is well settled law that any threat with a disadvantage to the victim suffices, RG 60, 373[10], BGH 25, 215[11].

Thus, not only is the question which law applies outcome-determinative, but so is the question whether the threat exercised by respondents was improper, wherefore petitioner should be allowed to prove that the release was in fact obtained by an improper threat, if not by extortion. The principles of German law, as applicable here, are not that alien to federal law, including federal common law, as is evident from Restatement of Contracts (2nd) and Restatements of Torts (2nd).

As to federal common law, Restatement of Contracts (2nd) §175(1) does provide guidance:

WHERE A PARTY'S MANIFESTATION OF ASSENT IS INDUCED BY AN IMPROPER THREAT BY THE OTHER PARTY THAT LEAVES THE VICTIM NO REASONABLE ALTERNATIVE, THE CONTRACT IS VOIDABLE BY THE VICTIM; RESTATEMENT OF CONTRACTS, 2nd, § 175 (1).

A THREAT IS IMPROPER IF WHAT IS THREATENED IS A CRIME OR A TORT, OR THE THREAT ITSELF WOULD BE A CRIME OR A TORT IF IT RESULTED IN OBTAINING PROPERTY, REST ATEMENT OF CONTRACTS, 2nd, § 176 (1).

A THREAT IS IMPROPER IF THE RESULTING EXCHANGE IS NOT ON FAIR TERMS, AND (a) THE THREATENED ACT WOULD HARM THE RECIPIENT AND WOULD NOT SIGNIFICANTLY BENEFIT THE PARTY MAKING THE THREAT, (b) THE EFFECTIVENES OF THE THREAT IN INDUCING THE MANIFESTATION OF ASSENT IS SIGNIFICANTLY INCREASED BY PRIOR UNFAIR DEALING BY THE PARTY MAKING THE THREAT, OR (c) WHAT IS THREATENED IS OTHERWISE A USE OF POWER FOR ILLEGITIME ENDS, RESTATEMENT OF CONTRACTS, 2nd, § 176 (2).

Restat. Contracts 2nd, Ch. 7, § 176 Comment b: Crime or Tort:

> *A threat is improper if the threatened act is a crime or tort, as in the traditional example of threats of physical violence and of* ***wrongful seizure or retention of goods****.*

The threatened act need not involve harm to person or goods but may, for example, involve a tortious interference with another's contractual rights.
The threatened act ***need not be a crime or tort if the threat itself would have been one had it resulted in the obtaining of property.*** *Therefore, in jurisdictions, where a broad modern extortion statute has been enacted, many of the threats that come within Subsection (2) are elements of the crime of extortion and therefore fall within Clause (1)(a).*

(See also **New York Penal Law** § 155.40 [Grand Theft by Extortion] **Florida Statute** 836.05 [Threats, Extortion], or for that matter **Germany's Criminal Code** § 253 StGB [Extortion].

The American Law Institute gives an illustration to Restatement of Contracts, 2nd, § 175 on page 478 which fits this case to the dot on the i:

Petitioner, relying on fraudulent promises, sells his com - pany, expanding it for a hightened performance; upon fulfillment of the contractual obligations by petitioner, respondents refuse to pay and withhold all funds due to petitioner and threaten not to pay anything unless petitioner agrees to a change of contract. Petitioner being in clinch with his bank for an overdraft covering cash-outlays, made on instruction of respondents, contacts his bank which refuses further credit and demands coverage of the over - draft, threatens foreclosure, and reports petitioner's default to credit reporting agencies, making petitioner's attempts to obtain credit from other sources futile.

Petitioner, during negotiations with ZCC and in fear over the consequences of ZCC's threats suffers increasing chest pains and, as a result of respondents' conduct, shortly thereafter falls victim to a heart attack.

German law follows tendencies similar to the ones expressed in the Restatements. However, it applies an even simpler test. Under German law the test is:

a) Was the property obtained by threat?

b) Did the threat contain any disadvantage?

If the answer both to a) and b) is "yes" then the transaction (here the inclusion of §5 into the Termination Agreement) is void, not just voidable, under either §§134, or 138 BGB. Alternatively the victim can repudiate the declaration under §123 BGB. In either case the tortfeasors are liable (§823 BGB), regardless of the running of the statutes of limitations (§ 852 III BGB), for a return

of petitioner´s property, plus all benefits derived from its possession or operation, §818 BGB.

C. Future Remedy versus Immediate and Present Assault

Even if federal common law would apply instead of German law,

THE MERE AVAILABILITY OF A LEGAL REMEDY IS NOT CONTROLLING IF IT WILL NOT AFFORD EFFECTIVE RELIEF TO ONE IN THE VICTIM´S CIRCUMSTANCES, (Commentary (b) to RESTATEMENT OF CONTRACTS, 2nd, § 175)

Thus, petitioner has to prove that under the ´victim´s circumstances´ the pending of this lawsuit was no immediate relief from the immediate and present threat, exercised by ZCC.

T[HE] ALTERNATIVE [OF A LAWSUIT] MAY NOT *** BE REASONABLE IF THE THREAT INVOLVES *** THE SEIZURE OF PROPERTY, THE USE OF OPPRESSIVE TACTICS, OR THE POSSIBILITY OF EMOTIONAL CONSEQUENCES; (Commentary (a) to RESTATEMENT OF CONTRACTS, 2nd, § 175).

Respondents did seize petitioner´s property: their withholding of all funds due to petitioner was oppressive and manipulative. The emotional consequence of respondents´ actions is the heart attack, petitioner suffered.

Respondents have argued that the timelapse caused by a multi-year lawsuit is no defense to petitioner´s succumbing to their threat. The lower courts agreed: *Plaintiff had legal remedies available to avoid duress* (Exhibit A-20 ¶3) Petitioner vehemently disagrees: Neither respondents nor the District Court ever explained how a multi-year lawsuit provides an immediate relief to an immediate and present threat, where that threat is the cause of an impending heart attack of the victim?[12] page 21. Does the filing of a lawsuit pay unemployment compensation (where respondents maliciously misstated petitioner´s lengh of employment); does it

[12]Petitioner´s heart problems during negotiations with respondent´s agents became so severe that he could not walk beyond approx. 50 yards without rest, could not take a shower without excruciating chest pains or perform more than 50 Watts, as tests at the hospital showed (a normal person is capable of sustaining 200 Watts). Eventually he had to undergo open heart surgery and, today, is dependent on extensive supporting medication for which he is unable to pay.

provide bank credits? Does it reimburse the wrongfully withheld expenses, paid on behalf and on instruction of respondents (absent payment of the purchase price for petitioner´s company, his only liquid financial reserve)? Does it pay for the seized property or somehow miraculously cure petitioner´s heart attack?

Indeed, it does not! Thus, the question remains open whether the mere availability of a law suit, without relief for 6 to 10 years, is a reasonable alternative to the instant assault on the health of the victim, robbing it of its livelihood for the personal enrichment of the attacker by seizing his property, with the emotional consequence of a near-death heart attack. Here, the analogy of a car-jacking would be appropriate: should the victim let go of the car or defend it against the threat of his own destruction? Has the law really become so abstract that it protects the criminal up to the last heartbeat of its victim and no longer cares about the consequences of the criminal´s action to the victim?

A LEGAL REMEDY WHICH DOES NOT PROVIDE IM - MEDIATE RELIEF TO THE VICTIM OF AN IMMEDIA TE EX- TORTIONATE THREAT IS NOT REASONABLE AS DEFINED BY RESTATEMENT OF CONTRACTS, 2nd, § 175 (1)

A VICTIM OF EXTORTION IS NOT REQUIRED TO DIE FROM A HEART ATTACK INDUCED BY THE TORTFEASOR´S CONDUCT BUT IS ENTITLED TO LOOK FOR A LESSOR EVIL.

D. Repudiation

The issues of repudiation was introduced into the process by respondents, claiming that petitioner never repudiated. Res - pondents apparently have forgotten their own statements in these proceedings.

Respondents admit in their Memorandum of Law in Support of Motion to Dismiss, presumably dated July 22, 1992, on (Exhibit A-37 ¶ 2, sentence 2):

6. Despite that agreement, Von Grabe refused to execute a stipulation to discontinue the action.

In fact, **petitioner advised respondents twice that the contract had been signed under duress and was unenforceable** under German law.

Thus, petitioner timely repudiated the release.

E. Return of Consideration

The issue of consideration was introduced into the process by respondents, claiming that petitioner kept the consideration paid to him in settlement of the purchase contract for the sale and extension of petitioner´s company. However, respondents never paid consideration under the purchase contract.

The allocation of consideration under the Termination Agreement´ is unambiguously spelled out in that very agreement. The text provides (Exhibit A-23):

> *1. Employment Relationship Ziff Verlag / von Grabe*
> *1.1 End of Employment*
> *Ziff Verlag and von Grabe agree that the employment relati - onship between them has terminated at the instigation of Ziff Verlag for operational reasons on June 30, 1991.*
> *The net amount of the compensation for June 1991 will be paid by Ziff Verlag forthwith.*
> *1.2 Severance Pay*
> *As a compensation for the loss of his employment, Ziff Verlag will pay to von Grabe as severance pay according to §§ 9 and 10 of the Termination of Employment Act of 1969, in combi - nation with §§ 3, Nr. 9, 24 and 34 of the Income Tax Law an amount of DM 25,800 (in words: DM twentyfivethousand eighthundred).*

Thus, payment of consideration made to petitioner was made as severance pay for the loss of petitioner´s employment **by Ziff Verlag**, not a party to the purchase contract nor to this proceeding. No payments have been made by respondents to petitioner under the termination agreement, specifically there has been no payment of consideration for petitioner giving up his rights under the purchase contract with ZCC and ZDP.

WHERE NO CONSIDERATION HAS BEEN PAID, NO CONSIDERATION HAS TO BE RETURNED WHEN REPUDIATING RELEASE

Moreover, under New York Obligation Law §15-108, consideration paid, if any, can be deducted from an award, so as to avoid double recovery.

Respondents pleaded that Ziff Verlag paid DM 90,000, i.e. two thirds (sic) of the sum it had contracted with personnel con-

sultants Kahler, Bourne & Partner and that this was consideration to petitioner. However, petitioner, at no time material hereto was a partner in the partnership (he had left the partnership to avoid a conflict of interest before September 1, 1990). Finally, Ziff Verlag was obligated to pay to Kahler the contracted sum of DM 150,000, not two thirds of it.

German courts view this fundamentally different than the lower courts: "*A release requires that both parties make concessi - ons, because one of them does*", *(Oberlandesgericht (OLG) Munich, MÜ NJW* ***69****, 1306).*

F. Intent to Release other Tortfeasors

THE RELEASE OF ONE TORTFEASOR FROM LIABILITY FOR A HARM DOES NOT DISCHARGE OTHERS LIABLE FOR THE SAME HARM,

[A] UNLESS IT IS AGREED THAT IT WILL DISCHARGE THEM; Restatement of Torts 2d, § 885; or

[B] UNLESS ITS TERMS EXPRESSLY SO PROVIDE; New York. General Obligations law § 15-108.

The release, contained in the Termination Agreement (Exhibit A-23) states:

Termination Agreement
by and between
1. Ziff Verlag GmbH, Hanauer Str. 85, 8000 München 50,
- hereinafter referred to as "Ziff Verlag" -
2. Ziff Communications Company, One Park A venue, New York, N.Y. 10016
and all its divisions and affiliated companies,
- hereinafter collectively referred to as "Ziff" -
3. Mr. Walther von Grabe, Augustenfelder Str. 24 a 8000 München 50
- hereinafter referred to as "von Grabe" -
4. Kahler, Bourne & Partner, Augustenfelder Str. 24 a, 8000 München 50
- hereinafter referred to as "Kahler"
5. Overall settlement
Notwithstanding the rights granted above the par - ties under 1./2. and the parties under 3./4. agree to waive all possible claims which they may have against each other

under any agreement or understanding whatsoever (emphasis supplied).

From the foregoing becomes clear that the release does not contain one single shred of language which would release the individual respondents. The release of "all possible claims" is restricted instead to the parties listed and no other.

Notwithstanding the fact that the release was extorted, or at the very minimum obtained by improper threat, it covers ZCC and its divisions and affiliated companies. If the individual respondents where to be included, the simple addition of "...and its officers, employees and agents" would have sufficed. The absence of such an extension can only have but one plausible explanation: where the parties did not agree on their inclusion, the inclusion of the individual respondents was not even negotiated.

This Court, in Zenith Radio Corp. v. Hazeltine Research Inc, 401 US 321, 347; 91 S.Ct. 795, 810, points to Restatement of Torts (2nd) § 885 holding that the release of one tortfeasor does not release others. Thus, it appears that the Restatements reflect federal common law without the need for a District Court to "fashion a uniform rule".

The District Court in turn insists on New York law, or at least in part. Petitioner opposes adamantly such a strategy: Where the lower court selects the law of the State of New York, it will have no choice but to apply all of it, including New York General Obligation Law § 15-108 which holds that the release of one does not release other tortfeasors, unless *its terms expressly so provide.*

The mere language makes it utterly clear that under New York law **the release must expressly provide** that others are discharged. There is no room for interpretation, it covers agents, masters, servants and third parties and none is excempted. This is by no means coincidence.

The requirement of New York´s Obligation Law § 15-108 avoids the need to prove intent of the parties: If the terms of the release do not expressly provide otherwise, the intent of the parties is that only the expressly named are discharged, and thus, where New York law should prevail, petitioner is entitled to summary judgement against the individual respondents as a matter of law, leaving open the amount of damages to be determined by the trier of the case.

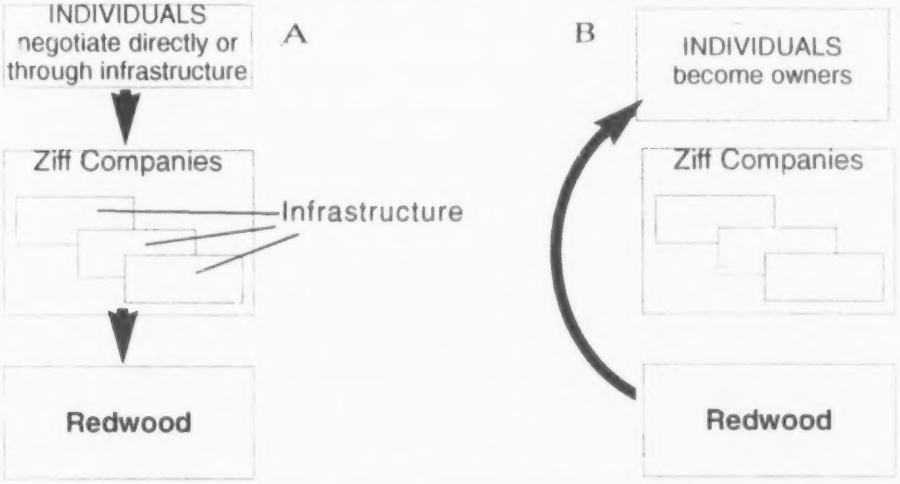
This is quite different than Restatement of Torts, 2nd, §885. There an agreement is required, which implies that the matter

agreed upon must at least have been discussed. The release of the individuals in this case was not, but, under the Restatements petitioner must prove that it was not; again a matter for the jury.

Petitioner had no incentive whatever to release the beneficiaries of ZCC´s agents´ fraud, which were using the corporate respondents as alter ego to enrich themselves.

There is no question that the individual respondents acted through the corporate respondents; petitioner himself has pleaded to that extent. But though they used funds of the corporations, they did not act on their behalf, as required in a master/servant relationship. If they would have acted on their behalf, the corporate respondents would have reaped the benefits from their actions. Instead, Redwood did not even temporarily end up in the hands of the corporations, as contracted, but in the hands of the very individuals who had become the stockholders of Redwood Press Verlags-GmbH (Exhibit A-27; Translation A-29). The only plausible conclusion is that the individual respondents acted through their corporations for their own personal benefit, comingling funds and identities, and at the end enriching themselves at the tune of $100 Million when they resold petitioner´s company to Forstman Little of New York as part of a 1.4 Billion Dollar transaction, thus, imposing liability on themselves even if the corporate respondents should have been released[13]

13 (A) Before: Individual owners fraudulently contract acquisition of Redwood through ZCC/ZDP using infrastructure as their agents;
(B) After: Individuals end up as owners of Redwood, and thus ZCC/ ZDP are not the beneficiaries of the transfer (Exhibit A-27 through 29)



WHERE TORTFEASORS USE A CORPORATION AS ALTER EGO TO ENRICH **THEMSELVES**, RATHER THAN THE CORPORATION, COMINGLING FUNDS AND IDENTITIES, THEY ARE NOT ACTING AS AGENTS OF THE CORPORATION, SINCE A PRINCIPAL CANNOT BE THE AGENT OF HIMSELF, and

thus, neither have the individual respondents been discharged for the fraud/extortion issues nor have the corporate respondents been discharged for the extortion issue, even if they should have been released under the fraud issue, since the release itself was the result of extortion.

Under German law, as tortfeasors to the same tort, they are jointly or severally liable for the damage inflicted and, absent payment under the purchase contract, are obligated to return the property unlawfully obtained, plus any gain derived therefrom. Where this is not possible, because the property was resold, they have to turn over all proceeds received from the sale of it.

Where this Court does not follow the argument that petitioner is entitled to summary judgement based upon admission of respondents, petitioner has to provide the evidence to prove these points, a task which is only possible by conducting full discovery, i.e. by submitting requests for admission, the subpoena of documents, and by deposing witnesses. From this becomes clear that discovery is an indispensible step of proper legal process, to which the court´s cooperation is needed to issue process under the Den-Hague convention, where witnesses are located in Europe.

Unquestionably, if petitioner would have had the opportunity to adduce the evidence during discovery, the outcome of the case would have been fundamentally different. Thus, the denial of discovery is a denial of due process under the 14th Amendment to the United States Constitution as well as under Article 103 of the Constitution of the Federal Republic of Germany, the latter being of equal weight where the impact of the summary judgement is foremost felt in Germany.

Future Fair Process

Petitioner is perceived by the District Court to be a German national. In an environment where the judge, the individual respon -

dents, and their attorneys have either lost family members or know families who have lost members in German concentration camps, even implying that the judge feels to be unbiased, it cannot be ruled out that subconsciously the Judge is biased, a fact not anticipated by petitioner when objecting to a transfer of this case from the Middle District of Florida to the Southern District of New York for the convenience of the parties, i.e. the respondents. Under the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany, the petitioner should enjoy the same rights before a U.S. court as do its citizen. However, from the proceedings and the content of the Summary Judgement (Exhibit A-10 . . .24) it is obvious that laws, including case laws, applied to US citizen have been denied to petitioner . Thus, it becomes clear that petitioner cannot have a fair trial in the Southern District of New York. For which reasons petitioner will pray that this Court remands the case under change of venue to the Middle District of Florida, where respondents are doing business for over ten years by selling their products through wholesalers, or distributors, and where he can get a fair jury trial. Such change of venue will not place a burden on respondents since depositions will take place in New York, Munich and possibly Paris; written interrogatories have no influence on the burden, nor have requests for admission or the presentation of documents.

VI. Conclusion

The steady increase in international dealings requires the absolute certainty that laws, as written by the legislative and interpreted by the highest courts of a land, are observed by the parties to a transaction and upheld by the lower courts as well. Without such certainty, commerce is impossible, moreover our society must fall into anarchy.

Respectfully, to a non-citizen for over 30 years involved in internatinal dealings, it must appear outragious that a lower court with impunity may substitute its own set of rules for laws, written by Congress under the authority of the Constitution, and well settled by this Court, by

(1) entrapping parties to a process

(a) by first ruling that it is premature to plead matters of conflict of law, and then - without warning - blame the parties for not having argued it;

(b) by denying a party the right to conduct discovery and then blaming it for failing to present evidence

(2) blatantly overruling not one but no less than seven precedents set by this Court, and

(3) making a mockery of the Federal Rules of Civil Procedure demanding speedy process by, for three years (!), not answering two motions to compel (the clerk of the court to issue a summons so that service under the pre-1993 set of rules can be made) and then blaming petitioner that he(!) let the case be dormant (see A-2 ¶2; A-22 ¶ 1).

Thus, this petition respectfully presents the question, whether a judgement should be affirmed, which is in direct conflict with

Anderson v. Liberty Lobby, Inc, 477 US 242 (1986)
Celotex Corp. v. Catrett, 477 US 316 (1986)
Erie Railroad v. Tomkins 304 US 64
International Shoe Co. v. Washington, 326 US 310 (1945)
Neitzke v. Williams, 490 US 319 (1989)
Sedima S.P.R.L. v. Imrex Co 473 US 481 (1985), and
Zenith Radio Corp. v . Hazeltine Research 401 US 321

as well as in conflict with

Restatement of Torts (2nd) §§ 885, 892B;
Restatements of Contracts (2nd) 175 (1), 176 (1)(2);
Restatements of Conflict of Laws (2nd) §§145, 147, 148 159, 160;
the Privileges and Immunities Clause of Article IV , Section 2;
the VII. Amendment;
the XIV Amendment, Section 1, sentence 2;
the Due Process Clause in Article 103 of the Constitution of the Federal Republic of Germany;
the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany.

Finally, where the District Court punished a foreign pro se petitioner for being unfamiliar with federal process by dismissing this action with prejudice, its punishment is excessive under the VIII Amendment of the United States Constitution.

In the interest of justice and international relations this Court should not allow respondents to commit torts in Germany

and then get away with it due to their insufficient presence in Germany for German courts to exercise in personam jurisdiction and due to arbitrary and capricious process in the Southern District of New York.

Wherefore petitioner respectfully prays that

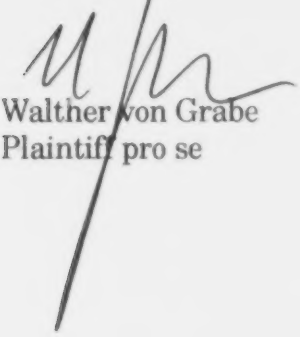
(1) a writ of certiorari issue,

(2) this Court vacate the judgement of the Court of Appeals for the Second Circuit,

(3) enter Summary Judgement against the individual respondents and remand this matter for determination of damages to the jury for trial under supervision of this Court; alternatively

(4) remand this matter - under change of venue - to the District Court for the Middle District of Florida, for trial by jury upon sufficient time for discovery

Respectfully submitted



Walther von Grabe
Plaintiff pro se

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

WALTER VON GRABE,
Plaintiff — 91-CV-6275 (DLC)

- v -

ZIFF DAVIS PUBLISHING CO., ZIFF COMMUNICATIONS COM., WILLIAM B. ZIFF, ROBERT D. ZIFF, AND PHILLIP B.KORSANT
Defendants.

MEMORANDUM OPINION AND ORDER

DENISE COTE, District Judge:

This matter comes before the Court today on plaintiff Walther von Grabe´s motion for temporary restraining order. In this motion, von Grabe requests that the Court restrain the defendants Ziff Davis Publishing Co. ("Ziff Davis"), Ziff Communications Co. ("Ziff"), and various officers and owners of these corporations:

> 1. from destroying, conceiling, [sic] transferring into the possession of third parties, or otherwise withholding any evidence, related to this action or related to any attempts to acquire, or the acquisition of, other companies up to 10 years before the time of the incidents of this action, [including various documents listed by plaintiff].
> 2. from selling defendants´ asset Ziff Verlag GmbH of Munich, Germany, to any third party without prior written consent of this Court.

Because, as described below, plaintiff has set forth no evidence to support the allegations in this motion, plaintiff´s request for restraining order is denied in full.

BACKGROUND

Plaintiff filed this actionon June 28, 1991, in the Middle

District of Florida, seeking to recover from the defendants sums allegedly due under various employment, consultant and broker agreements. In this complaint, plaintiff asserts four causes of action. The first two are based on breach of two employment agreements between Ziff and the plaintiff. The third, which the plaintiff has subsequently withdrawn, is based on alleged age discrimination. The final cause of action is based on RICO, and asserts that the defendants conspired to deny plaintiff just compensation for his efforts to assist the defendants in creating a German language computer magazine.

The action was subsequently transferred to the Southern District of New York, and sat essentially without any activity from 1991 until 1994. During that period plaintiff attempted unsuccessfully to have the clerk of the court affix a seal on the complaint and summons so that plaintiff could serve the defendants.[1] At a conference held on October 28, 1994, after this case was transferred to me, defendants agreed to waive service and move forward to address the merits of the action.

Apparently, on October 27, 1994, the day before the conference, Ziff Davis publicly announced its impending purchase by Forstman Little. Plaintiff learned of this after leaving New York to return to his home in Florida. Without conducting any review of the facts or research into the applicable law, plaintiff submitted to the Court the above described motion for a temporary restraining order.[2]

STANDARD FOR TEMPORARY RESTRAINING ORDER

A temporary restraining order ("TRO"), like a preleminary injunction, is an extraordinary remedy that will not be granted lightly. See Borey v. National Union Fire Insurance Co. 934 F.2d 30,33 (2d Cir. 1991); Leibowitz v. Smith Barney Inc.,

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[1]Plaintiff originlly sought to have the clerk of the court serve the complaint pursuant to the pre-1993 Rule 4

2Plaintiff's motion does not cite to the Federal Rules, cites no case law, and did not include an affidavit or memorandum of law in support of the motion. Althrough this Court is cognizant of the fact that pro se plaintiffs must be granted leniency in complying with the technical pleadings requirements, in this case plaintiff is highly educated and fully capable of complying at least with the substance of the federal and Local Rules. Only after defendants responded to the motion did plaintiff submit affidavit and memorandum of law.

863 F.Supp. 171, 172 (S.D.N.Y. 1994). The standard for determining whether to grant a TRO is the same as used in evaluating a motion for preleminary injunction. See Local 1814, International Longshoreman's Association AFL-CIO v. New York Shipping Association, Inc., 965 F.2d 1224, 1228 (2d Cir. 1992) (quoting unpublished lower court opinion by Judge Sand); Leibowitz, 863 F.Supp. at 173. In order to obtain relief, the party must establish

> (1) irreparably injury and (2) a likelyhood of success on the merits or a sufficiently serious question going to the merits and a balance of hardships tipping decidedly in the moving party's favor.

Leureyssens v. IDEA Group, Inc., 964 F.2d 131, 135-36 (2d Cir. 1992). The most important element in determining whether to grant a TRO is a demonstration by the movant that without the order, the movant is likely to suffer irreparable injury. Borey, 934 F.2d at 34. This inury "must be shown to be imminent, not remote or specualtive." Reuters Ltd. v. United Press International, Inc. 93 F.2d 904, 907 (2d Cir. 1990).

IRREPARABLE INJURY

As basis for the TRO, plaintiff asserts that without intervention of the Court the defendants will destroy evidence and flee the Court's jurisdiction. The plaintiff claims:

1. Defendants will destroy evidence
   a) in order to conceal the existence of this law suit [sic] from the investor group, and
   b) in order to prevent Plaintiff from proving his case.[3]
2. Defendants will cash the fruit of this sale [to Forstman Little], to wit 1.4 Billion Dollars, a portion of which is claimed

[3]Plaintiff further asserts that:
[counsel] has no control over the actions of Defendants' employees, which are under attack by Plaintiff's RICO allegation and therefore gave a vested interest in destroying any evidence which may incriminate them and which could even lead to criminal prosecution, and Plaintiff has great difficulties to picture counsel as being so gullible as to believe that individuals who have commited fraud, as is clear from the evidence, would not also resort to obstruction of justice if it furthers their cause (emphasis deleted)

by Plaintiff as his rightfully earned compensation, and retire outside the United States, making it thereby impossible for the Court to maintaion in personam jurisdiction over Defendants and preventing Plaintiff from obtaining the relief prayed for in this complaint.

Plaintiff, however, provides absolutely no factual basis to support these allegations.

To support his claim that defendants will destroy evidence without court intervention, plaintiff merely asserts that the defendants "plan to sell the evidence in this case to [Forstman Little, which is] unrelated to this action and which is under no obligation whatsoever to preserve the evidence."

Defendants note in contrast, that Forstman Little has publicly announced its intention to leave virtually intact the various Ziff divisions being purchased. As defense counsel states, "Ziff Verlag´s operations and internal procedures are expected to remain essentially the same, notwithstanding the transfer of ownership." Thus, there is no indication that the sale to Forstman Little will result in the destruction of corporate documents.

Moreover, plaintiff has presented no evidence that the defendants have at any time attempted to impede this action. To the contrary, both the corporate and individual defendants have agreed to waive service of the complaint so that the Court and the parties can avoid expending energy on procedural issues and reach the merits of plaintiff´s complaint. With no evidence that the defendants have expressed any intent to destroy evidence, plaintiff´s allegations are no more than idle speculation. As such, plaintiff has failed to show that absent the requested relief he will suffer irreparable injury.

As to the plaintiff´s request that the sale of Ziff Verlag GmbH be enjoined in order to avoid dissipation of assets, plaintiff´s claim again is entirely unsupported. Plaintiff puts forth no evidence that by completing the sale to Forstman Little any of the defendants will suddenly become judgement proof. Significantly, the stated intent of the parties to the transaction is entirely contrary to plaintiff´s assertions.

> The Ziff familiy will retain a small equity interest in the company. Ziff-Davis will continue to be based in New York City and ran [sic] by its current manage-

ment team headed by chairman and chief executive officer, Eric Hippeau. No changes are planned in Ziff-Davis´s editorial direction, organizational structure or workforce.

"Ziff Familiy Sells Ziff-Davis Publishing Company to Forstman Little For $1.4 Billion." PR Newswire, Oct. 27, 1994. Thus, there is no indication that the defendants intend to take their $1.4 billion and escape the jurisdiction of this Court. Plaintiff´s contrary assertion without more is insufficient to create a showing of irreparable injury.

JURISDICTION

Plaintiff´s fear that in some manner this Court will lose jurisdiction over the individuals is also specious. Except for those persons who were originally defendants and who have since been dismissed, all of the defendants have accepted service of the complaint. Defendants in this action must answer or move to dismiss the complaint by December 30, 1994, and any objections to personal jurisdiction must be raised at that time. Rule 12 (b)(2), Fed.R.Civ.P. Failure to raise the defense at the time constitutes a waiver of the defense, and the defendants cannot later claim lack of personal jurisdiction. Rule 12(h)(1) Fed. R.Civ.P.

LIKELIHOOD OF SUCCESS ON THE MERITS

In addition to plaintiff´s failure to show that without the requested relief he will suffer irreparable inujry, there are serious questions as to the merits of plaintiff´s claims. To begin with, plaintiff´s lawsuit is very likely barred by a prior settlement agreement. On August 5, 1991, Ziff Verlag GmbH, Ziff Communications Comp., Walther von Grabe, and Kahler, Bourne & Partner (a partnership apparently controlled by von Grabe) entered into a settlement agreement that stated in part:

> Von Grabe and Kahler shall forthwith withdraw all legal actions filed against Ziff, in particular the complaint before the Arbeitsgericht Munchen (File No. 26 Ca 5916/91) and the complaint filed in the USA against ZCC.
>
> Notwithstanding the rights granted above the parties under 1./2. and the parties under 3./4. agree to waive all possible claims which they may have against each other

under the agreement or understanding whatsoever .

The plaintiff and a partnership with which he was associated accepted approximately §70,000 pursuant to the terms of the settlement agreement. Thus, in order to maintain this action, plaintiff must show that thsi agreement is invalid.

In an effort to avoid the terms of this agreement plaintiff asserts in his complaint that:

> Plaintiff -- acting under duress and in a effort to forestall foreclosure of his bank -- had no choice but to sign the separation agreement, whereby Defendants unjustly enriched themselves.

In his reply memorandum in support of his motion, plaintiff further asserts that he had no choice but to sign the agreement because he had no legal recourse against the defendants as they were not subject to the jurisdiction in Germany.

In order to avoid the terms of a settlement agreement based on duress, the aggrieved party must show that the agreement was obtained:

> (1) by means of wrongful threat precluding the exercise of free will; (2) under the press of financial circumstances; (3) where circumstances permitted no other alternative.

DuFort v. Aetna Life Insurance Co., 818 F.Supp. 578, 582 (S. D.N.Y. 1993) quoting Nelson v. Stanley Blacker, Inc. 713 F.Supp. 107, 110 (S.D.N.Y. 1989)); accord Kovian v. Fulton County National Bank and Trust Co., 857 F.Supp. 1032, 1037-38 (N.D.N.Y. 1994) (discussing duress under federal common law); McLaughlin v. Department of Natural Resources, 526 So.2d 934, 938 (Fla. Dist.Ct. App. 1988) (setting forth a similar rule, which also requires a showing of no alternative settlement).[4]

In this case the plaintiff has failed to show that he had no alternative to signing the release. The most common alternative to signing such a release is to bring a legal action. When such a remedy is available a claim of duress must fail. see, e.g., Durante Brothers and Sons, Inc. v. Flushing National Bank, 755 F.2d

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[4]Although it is unclear at this stage which law will govern this issue, the law of New York and Florida, as well as the federal common law are similar in their requirements for a showing of duress. As such, it is unnecessary at this stage to resolve the choice of law question

239, 251,52 (2d Cir. 1985); Nelson, 713 F.Supp. at 110; Jomar Bakery Corp. 552 N.Y.S. 2d 363, 363 (App.Div. 1990) (plaintiff cannot claim economic duress where the party "elected to forego legal remedies available to it, and, instead, released its rights").

Plaintiff has made no showing that "the ordinary remedy of an action for breach of contract would not be adequate." DuFort, 818 F.Supp. at 582 (quoting Austin Instruments v. Loral Corp., 324 N.Y.S.2d 22,26 (1971)). To the contrary, prior to the date plaintiff signed the release, plaintiff had filed this very action in the Middle District of Florida. Thus, at the time he signed the release, plaintiff was well aware of his ability to seek redress through the courts. Although without a more fully developed record, this Court is not prepared to dismiss plaintiff's claims in total, plaintiff's motion for a temporary restraining order falls far short of demonstrating a likelihood of success on the merits.

Security Requirement

There is one additional requirement necessary for this Court to grant a the relief requested in plaintiff's motion. Pursuant to Rule 65(c),

> (n)o restraining order or preleminary injunction shall issue except upon giving of security by the applicant, in such sum as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Rule 65(c), Fed.R.Civ.P. Plaintiff has made no indication that he intends to or would be able to supply the requisite security for this Court to restrain or enjoin a §1.4 billion transaction. Considering that the plaintiff has previously requested in forma paüperis statuts, it is doubtfull that, even assuming plaintiff could supply sufficient facts to meet the heavy burden necessary to obtain the relief requested, that plaintiff would be able to post the necessary security, which would likely be in the millions of dollars.

CONCLUSION

Plaintiff's motion for a temporary restraining order is denied in full.

SO ORDERED:

Dated: New York, New York
December 28, 1994

s/_____
Denise Cote
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

WALTER VON GRABE,

Plaintiff

- against -

ZIFF DAVIS PUBLISHING CO., ZIFF COMMUNICATIONS COM., WILLIM B. ZIFF, ROBERT D. ZIFF, JAMES W. STAFFORD, JEFFREY D. STAFFORD CHARLES B. SETON, AND PHILLIP B. KORSANT

Defendants.

91-CV-6275

ORDER

Denise Cote, District Judge:

By motion dated February 28, 1995, plaintiff in this action requests permission pursuant to the last sentence of Rule 33(a) to serve interrogatories on the defendants prior to conducting a Rule 26(d) meeting. Pursuant to Rule 49 of the Civil Rules of the United States District Court for the Southern and Eastern District of New York, the last sentence of Rule 33(a) does not apply to actions commenced in the Southern District of New York. Thus, plaintiff's request is moot. Nonetheless, because a motion to dismiss the claim will be fully submitted on March 31, 1995, it is hereby

ORDERED that discovery is stayed in this action until resolution of defendants' motion to dismiss.

SO ORDERED:

Dated: New York, New York
March 8, 1995

s/_____

DENISE COTE
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

WALTER VON GRABE,
Plaintiff

91-CV-6275 (DLC)

- v -

OPINION AND ORDER

ZIFF DAVIS PUBLISHING CO., ZIFF COMMUNICATIONS COM., WILLIAM B. ZIFF, ROBERT D. ZIFF, AND PHILLIP B.KORSANT
Defendants.

DENISE COTE, District Judge:

The defendants in the above-captioned action , move to dismiss the plaintiff´s Second Amended Complaint as barred by virtue of a prior settlement and release of liability signed by the plaintiff on August 5, 1991. In the alternative, the defendants move to dismiss the plaintiff´s RICO claim for failure to state a claim upion which relief can be granted. Jurisdiction is based on diversity of ciitizenship and the presence of a federal question. 28 U.S.C. §§ 1331, 1332 (1988). For the reasons set forth below the defendants´ motion is granted and the action is dismissed with prejudice.

BACKGROUND

The facts as alleged in the complaint and in the parties´ submission in connection with the instant motion, to the extent they were not disputed by the plaintiff, are as follows. The plaintiff, Walther von Grabe, is a citizen of the Federal Republic of Germany and currently resident of the State of Florida. He brings this action against the defendants Ziff Davis Publishing Co., Ziff Communications Co., (hereinafter, the "Ziff Companies"), William B. Ziff, Dirk Ziff, Robert Ziff, and Phillip Korsant (hereinafter, the "individual defendants"). The Ziff Companies are partnerships organized under the laws of New York

and have their place of business in New York. The individual defendants, with the exception of Mr, Korsant, are partners and co-owners of the Ziff Companies. Mr. Korsant is Vice-Chairman of Ziff Davis Publishing Company and co-owner of Ziff Verlag GmbH, a German publishing company that will be discussed in further detail below. The Ziff Companies are engaged in the business of publishing various periodicals, including PC Magazine and PC Week.

This action stems from a business relationship between the plaintiff and the defendants, the overall purpose of which was to create a presence for the Ziff Companies´ products in Germany. The relationship began sometime in December 1989, when the plaintiff proposed entering into a joint venture with the defendants and subsequently registered a publishing company, Redwood Press Verlags-GmbH, (hereinafter called "Redwood"), in Würzburg, Germany, for that purpose in January 1990. The plaintiff, however, later changed his proposal. Having learned that a German special interest publishing house, Franzis Verlag GmbH (hereinafter "Franzis"), was for sale, on February 27, 1990, the plaintiff advised two employees of the Ziff Companies, Jean Lamensdorf and Eric Hippeau, of this opportunity and offered his services as a broker in the acquisition. Given Franzis´s poor performance the plaintiff also offered his services as an ongoing consultant in the event of Franzis´s acquisition.

Thus, from March 1990 to September 1990, the plaintiff performed various consulting services for the defendant Ziff Davis Publishing Company. These services included an analysis of German computer magazines, and other tasks. According to the plaintiff, these consulting services were performed under a separate agreement (hereinafter, the "March 1990 agreement") and were not related to his services as broker in the Franzis acquisition under an agreement allegedly entered on April 1990, which is described further below. The plaintiff has received no compensation for his consulting services under the March 1990 agreement.

On April 3, 1990, the plaintiff received a telefax from Jean Lamensdorf, in which the plaintiff claims that the defendants assented to his proposal to act as a broker and promised him "fair compensation depending on where the deal ends up and

(plaintiff's) contribution to it" (hereinafter, the "April 1990 agreement"). The plaintiff accepted this offer on the condition that he be paid a minimum of 3% on the investment. With the plaintiffs assistance, in July 1990, the defendants reached a handshake agreement with Peter Maier and signed a letter of intent for the sale of Franzis. To further Franzis acquisition, the Plaintiff offered to use Redwood as a holding company vehicle. Acting under the instruction of of two executives of the Ziff Companies, Phillip Sine and Tom Thompson, the plaintiff transferred legal title to the shares of Redwood into the ownership of Franzis. Redwood was subsequently renamed to Franzis Verlag Redwood GmbH (hereinafter "Franzis Redwood"). Immediately thereafter, and (according to the plaintiff) under the pretext of wishing to close the acquisition of Franzis, the defendants acquired from Franzis all of Franzis Redwood's shares at no cost to the defendants.

On or about September 15, 1990, Eric Hippeau instructed the plaintiff to return to his original proposal (i.e. the joint venture) and bring Franzis Redwood into full operation. From December 1990 until February 1991, the plaintiff -- either personally or through others, such as plaintiff's partners at Kahler, Bourne & Partner (hereinafter "Kahler") -- hired personnel, rented new offices, ordered and installed equipment, and performed other tasks to bring Franzis Redwood into full operation. Franzis Redwood was subsequently renamed to Ziff verlag GmbH (hereinafter "Ziff Verlag"), and the first issue of its magazine, PC Professionell, was published on March 3, 1991. Also in March 1991. the plaintiff was hired as Productiin Manager by Ziff Verlag; he was subsequently laid off on April 30, 1991. According to the plaintiff, the defendants withheld payments for expenses due to the plaintiff (in excess of $40,000), refused to pay his salary beyond the end of May, and have not paid him pursuant to the April 1990 agreement.

Plaintiff's Second Amended Complaint mentions two other agreements; first, a consulting agreement for services from October 1, 1990 through December 31, 1990; and second, an employment contract between Ziff Verlag and the plaintiff, entered into on February 1, 1991[1]. Neither contract is part of this action.

On June 28, 1991, the plaintiff commenced this action by

filing a complaint in the United States District Court for the Middle District of Florida. The Plaintiff also commenced an action in Germany before the Arbeitsgericht Munchen. On August 5, 1991, the plaintiff signed a separation agreement (Titled "terminatiion" agreement). Pursuant to this agreement, the plaintiff agreed to withdraw "all legal actions filed against" Ziff Verlag and the Ziff Companies, "in particular the complaint before the Arbeitsgericht Munchen ... and the complaint filed in hte USA" against the Ziff Companies.[2] The plaintiff apparently withdrew the action before the German court; however, he failed to withdraw the Florida action. The case was subsequently transferred to this Court in August 1991. With the exception of an unopposed motion to dismiss the complaint, which was filed by the defendants in July 1992, the action remained dormant until the Court ordered a pretrial conference on September 28, 1994.

The Complaint

Based upon the foregoing facts, the plaintiff alleges five causes of action. Counts I and II are claims for breach of contract based on those facts underlying the April and March 1990 agreements, respectively. Count III is an age discrimination claim and has been withdrawn by the plaintiff. Count IV is based "essentially upon the same facts forming the basis for the allegations in Count 1," and it pleads a cause pursuant to RICO, 18 U.S.C. §§ 1962 (a), (b), (c) and (d). Count V alleges that the circumstances surrounding his signing of the separation agreement state a claim for extortion under the Hobbs Act, 18 U.S.C. § 1951, and the Travel Act, id. § 1952.

Standard

The first question for the Court is whether this motion should be more appropriately characterized as a motion for

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[1]According to the plaintiff, the October 1990 consultiong agreement was entered on December 17, 1990, and applied retroactively to October 1, 1990, "upon repeated urging of Plaintiff for reimbursement of certain out-of-pocket expenses in the amount of approx. $200,000 and Plaintiff's request for compensation for his day to day work." In his affirmation in opposition to defendants' motion to dismiss, the plaintiff admits that defendants have paid whatever amount was due and owing pursuant to this agreement.

[2]The separation agreement is quoted in the Appendix, infra.

sumary judgement. Although the defendants have moved to dismiss the action presumably pursuant to Rule 12(b)(6), Fed.R.Civ.P., a court may convert a motion to dismiss into a motion for summary judgement under Rule 56, Fed.R.Civ.P., when "matters outside the pleadings are presented to and not excluded by the court," Rule 12 (b), Fed.R.Civ.P. A district court may not so convert a motion under Rule 12(b), however, "without sufficient notice to an opposing party and an opportunity for that party to respond." Groden v. Random House, Inc. 61 F.3d 1045, 1052 (2d Cir. 1995) (citing In re G. & A. Books, Inc., 770 F.2d 288, 294-95 (2d Cir. 1985), cert.denied 475 U.S. 1015 (1986)). Thus, to determine whether a district court may properly convert a motion to dismiss into one for summary judgement,

> "The essential inquiry is whether the appellant should reasonably have recognized the possibility that the motion might be converted into one for summary judgement or was taken by surprise and deprived of a reasonable opportunity to meet the facts outside the pleadings."

Groden, 61 F.3d at 1052-53 (quoting In re G. & A. Books, Inc. 770 F.2d at 295). However, "(n)otice is particularly important when a party is proceeding pro se and may be unaware of the consequences of his failure to offer evidence bearing on triable issue.
Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 767 (2d Cir. 1983)(citing cases).

In this case, both parties presented matters outside the pleadings. the defendant's motion included an affidavit, with exhibits attached, of J.Malcolm Morris, which was previously submited in connection with defendants' opposition to plaintiff's motion for temporary restraining order.[3] The plaintiff, through his January affirmation in opposition to defendants' motion to dismiss, placed before the Court several documents. Both submissions included the August 5, 1991 termination agreement that is the basis of defendants' instant motion to dismiss. Given that the defendants' motion papers included the termi-

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[3]On December 29, 1994, the Court denied a motion by the plaintiff to restrain the sale of Ziff Verlag to Forstmann Little. see von Grabe v. Ziff Davis Publishing Co., 1994 WL 719697 (S.D.N.Y. Dec. 29, 1994)(Not reported in F.Supp.).

nation agreement and made prominent use of it in their motion to dismiss, it cannot be said that converting the motion to one for summary judgement has "'taken [the plaintiff] by surprise'". Groden, 61 F.3d at 1053 (quoting In re G. & A. Books, Inc. 770 F.2d at 295). As is evidenced by the plaintiff's vigorous arguments and submissions of matters outside the pleadings in his opposition papers, it is clear that he was not deprived of a resonable opportunity to meet the facts outside the pleadings,'" id., and that he was "aware of the consequences of his failure to offer evidence bearing on triable issues." Beacon Enterprises, 715 F.2d at 767. Therefore, I find that there was sufficient notice to the plaintiff, and that it is appropriate for this Court to treat the current motion as a motion for summary judgement.

Summary judgement may not be granted unless the submission of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Rule 56(c), Fed.R.Civ.P.. In making this judgement, the burden is on the moving party, and all facts must be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247 (1986); Celotax Corp. v. Catrett, 477 U.S. 317, 323 (1986). In addition, because plaintiff is acting pro se, the Court "must read [plaintiff's] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest." Burgos v. Hopkins, 14 F.3rd 787, 790 (2d Cir. 1994); accord Soto v. Walker,, 44 F.3rd 169, 173 (2d Cir. 1995). When the moving party has provided sufficient evidence to support a motion for summary judgement, however, the opposing party must "set forth specific facts showing that there is a genuine issue for trial," and cannot rest on mere allegations or denials" of the facts asserted by the movant. Rule 56(e) Fed.R.Civ.P.; accord Rexnord Holdings Inc. v. Bidermann, 21 F.3rd 522, 525-26 (2d Cir. 1994). Thus, in determining whether to grant summary judgement, this Court must (i) determine whether a factual dispute exists based on evidence in the record, and (ii) must determine, based on the substantive law at issue, whether the fact in dispute is material.

Plaintiff challenges the validity of the separation agreement on various grounds, namely duress, extortion, and lack of consideration. Plaintiff raises the issues of choice of law by asserting that the separation agreement's effect on his breach of contract claims is governed by Florida rather than New York law. With respect to plaintiff's state law claims, the defendants' ignore the choice of law issue and base their brief solely on New York law.

In determining what law applies, a Court exercising its diversity jurisdiction must look to the choice of law rule applied in the forum state, which in this case is New York. See Klaxon Co. v. Stentor Electric manufacturing Co, 313 U.S. 487. 496 (1941). This case, however,, was transferred to this Court from the United States District Court for the Middle District of Florida, pursuant to 28 U.S.C. § 1404(a).[4] When a case is transferred pursuant to Section 1404(a), the transferee court must apply the choice of law rules that the transferor court would have applied. See Van Dusen v. Barrack, 376 U.S. 612 (1964); Lombard v. Economic Development Administration of Puerto Rico, 1995 WL 447651, at *2 (S.D.N.Y. July 27, 1995)(Not reported in F.Supp.): Aequitron Medical, Inc. v. CBS, Inc., 1994 WL 30414, at*2 (S.D.N.Y. Feb. 2, 1994)(Not reported in F.Supp.). Van Dusen, however, is limited to cases that could initially have been maintained in the transferor court. Lombard, 1995 WL 447651, at *2; Aequitron, 1994 WL 30414, at *2-*3 (citing cases). Otherwise, the applicable law, including choice of law rules, would be the state law, including choice of law of the transferee court Id.. If transfer is made pursuant to Section 1494 (a) and the

> Transferor court has not ruled in the propriety of venue or jurisdiction, [then] the transferee court must determine whether venue and jurisdiction would have been proper in the transferor court in order to decide which forum state's law will apply.

Davis v. Costa-Gavras, 580 F.Supp. 1082 (S.D.N.Y. 1984), (citing Martin v. Stokes, 632 F.2d 469, 474 (6th Cir. 19980));

[4]Section 1404(a) states:
For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. 28 U.S.C. § 1404(a)

Lombard, 1995 WL 447651, at *2 (same).

The Florida Court did not decide whether venue or jurisdiction was proper when this case was transferred, In an action such as this one, where "jurisdiction is not founded solely on diversity of citizenship," 28 U.S.C. § 1391(b), proper venue would lie in

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events of omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant may be found, if there is no district in which any defendant may be found, if there is no district, in which the action may otherwise be brought.

28 U.S.C. § 1391(b). Pursuant to Section 1391 (b), I find that venue would have been improper in Florida. It appears that non of the defendants is a Florida resident, and none of the events underlying plaintiff's claims took place in Florida. Therefore, the separation agreement will be examined under New York choice of law.

In breach of contract actions, New York relies on a "center of gravity" or "groupng of contacts" analysis, whereby the jurisdiction with the most contacts to the contract at issue has the greater interest in having its law appliey to the interpretation and enforcement of the contract. See Lombard, 1995 WL 447651, at *3 (citing cases). In determining where a contract's "center of gravity" lies, New York courts consider a number of factors: the place of contracting, negotiation, or performance, the location of the subject matter of the contract; and the domicile, residence, nationality, place of incorporation, and place of business of the parties. see Wm. Passalacqua Builders, inc. v. Resnick developers South, Inc., 933 F.2d 131, 137 (2d Cir. 1991)(citing State Trading v. Assuranceforeningen Skuld, 921 F.2d 409, 417 (2d Cir. 1990); Lombard, 1995 WL 337651, at *3 (citing Zurich Insurance Co. v. Shearson Lehman Hutton, Inc. 618 N.Y.S.2D 609, 612 (1971); Restatement (Second) of Conflict of Laws § 188(2) (1971). Although not conclusive, "the parties' intention and place of the making of the contract are to be given heavy weight in determining which jurisdiction has the most significant contacts." Mechanic v. Princeton Ski Shop, Inc., 1992 WL 397576, at *2 (S.D.N.Y. Dec. 30, 1992) (Not reported in F.Supp.).

The separation agreement involved three German parties (Ziff Verlag, the plaintiff, and Kahler) and one New York entity, Ziff Communications Company. It was negotiated in Germany by Ziff Verlag's General manager, Helmut Kunkel, and it was executed in Munich, Germany. The alleged acts of duress were committed in Germany by Mr. Kunkel. Therefore, it would appear that Germany is the jurisdiction with the greatest interest with respect to the issue of the separation agreement's validity. Cf. Rutherford v. Gray Line, Inc., 615 F.2d 944 (2d Cir. 1980) (applying New York 's conflict rules, Pennsylvania had superior interest because release was executed in Pennsylvania by a Pennsylvania resident): Nevertheless, neither party has proved any legal authority for determining the validity of the separation agreement's release provision. Indeed the conflict of law issues were not briefed at all. In such situation,

> "where either no information, or else insufficient information, has been obtained about foreign law, the forum will usually decide the case in accordance with its own local law except when to do so would not meet the need of the case or would be in the interest of justice."

Nacional Financiera, S.N.C. v. American Airlines, Inc., 803 F.Supp. 886, 893 (S.D.N.Y . 1992) (quoting Restatement (Second) of Conflict of Laws § 136 cmt h at 378-79 (1971)). Accordingly, the release will be interpreted under New York law.[5]

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[5]Plaintiff raises the issue of federal common law with respect to the separation agreement's effect on his federal claims. The Court is aware that there is some case law that supports this point. See e.g. Kovian v. Fulton County Nat'l Bank and Trust Co., 857 F.Supp. 1932, 1037 & n.2 (N.D.N.Y. 1994)(examinign claim that release is unenforceable because of duress under "federal" common law of release"). Although it is "well established that federal common law governs the valiidity of purported releases of liability in connection with federal causes of action," id. citing Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115 (2d Cir. 1977), the fact that federal common law governs "does not mean that the district courts must fashion a uniform national rule." Olin Corp. v. Consolidated Aluminum Corp., 807 F.Supp. 1133, 1140 (S.D.N.Y. 1992)(citing cases). The issue is whether state law cont.
should operate by application of the state's sovereign power (or differently, whether federal law should incorporate state law), or whether a federal rule of decision should be crafted instead to displace state law. See O'Melveny & Myers

DISCUSSION

The separation agreement's release provision states:

Overall settlement

Notwithstanding the rights granted above the parties under 1./2. [i.e. Ziff Verlag and the Ziff Companies] and the parties under 3./4. [i.e., the plaintiff and Kahler] agree to waive all possible cliams [sic] which they may have against each other under any agreement or understanding whatsoever.

If the release were ambiguous, summary judgement would be inappropriate. Kay-R Electric Corp. v. Stone & Webster Construction Co., Inc. 23 F.3rd 55, 58 (2d Cir. 1994) (citing Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2dCir. 1992): Clifton Steel Corp. v. County of Monroe Pub. Works Dep't., 524 N.Y.S. 2d. 952, 953 (4th Dep't 1988)). I find, however, that the language here manifests a clear and unambiguous intent on the part of the parties to the separation agreement[6] to be released from any clim arising out of "any agreement or understanding" between them. Under New York law, "'[w]here . . . the language with respect to the parties' intent is clear and

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v. Federal Deposit Insurance Corporation, 114 S.Ct. 2048, 2053-54 (1994). "Such cases are . . . `few and restricted' . . . limited to situations where there is a significant conflict between some federal policy or interest and the use of state law.'" Id., quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963); Wallis v. Pan American Petroleum., 384 U.S. 63, 68 (1966). No such conflict arisies by applying New York law to this release. Therefore, New York law will also govern the issue of the separation agreements validity with respect to plaintiff's RICO claim.

[6]Plaintiff argues that even if the release is found valid it does not apply to his claim against the individual defendants. It is true that the individual defendants are not named in the separation agreement. However, it is clear from the facts that plaintiff's breach of contract claims are based on certain actions taken by agents of the Ziff Companies which, under agency principles would bind the Ziff Companies. In other words, the plaintiff has not alleged that the individuals defedants, acting in their individual capacity, made the contracts that are at issue in this case. Rather, since partnerships, like corporations, are legal constructs and cannot act except through their agents, the release applied to the indiivdual defendants insofar as they were acting as agents of the Ziff Companies. Since it is clear from Plaintiff's RICO state,ment that the individual defendants' alleged liability stemmed from their activities as agents of the Ziff Companies, the release, if found valid with respect to the RICO claims, would also apply to the individual defendants.

unambiguous, it will be given effect, regardless of one party's claim that he intended siómething else.'" Kay-R Electric, 23 F.3d at 58, quoting Thailer v. LaRocca, 571 N.Y.S.2d 569, 571 (2d Dep't1991). Further, "a release will not be treated lightly and will be set aside by a court only for duress, illegality, fraud. or mutual mistake." L & K Holding Corp. v. Tropical Aquarium at Hicksville, Inc. 596 N.Y.S.2d 468, 469 (2d Dep't 1993).

Finally consideration is not a prerequisite to the enforcement of a written release. Kay-R Electric, 23 F.3d at 59, citing N.Y. Gen.Oblig.Law § 15-303 (McKinney's 1989).[7]

The plaintiff claims that the release is invalid for reasons of duress[8] and lack of consideration.[9] As stated above, a written release that is unambiguous and not otherwise invalid will be given effect regardless of whether consideration was given in exchange for it. Therefore, plaintiff's consideration defense must fail. The plaintiff's allegation of duress is based on several factual grounds: his termination on April 30, 1991; his inability to get unemployment compensation and health insurance, and to find employment after his termination;[10] defendant's failure to make reimbursement for previous expenses; the threat of foreclosure by his bank; defendants' dragging out the time for negotiating the separation agreement; defendants' threatening that no payments would be made if plaintiff did not accept the terms of the separation agreement. Plaintiff also alleges that defendants' knew of his need to be

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[7]The section provides, in relevant part, that

> A written instrument which purports to be a total or partial release of all claims . . . . shall not be invalid because of the absence of consideration or of a seal.

N.Y.Gen.Oblig.Law § 15-303 (McKenney's 1989).

[8] Plaintiff also seems to argue that the separation agreement is invalid because it was the product of extortion. No authority was cited or found in this regard, and it appears that the plaintiff has conflated extortion into his defense of duress. therefore, the Court will consider only the law applicable to the defense or duress.

[9]Plaintiff also alleges that the release is invalid with respect to the March and April 1990 agreements because the defendants had a pre-existing duty to peform under those agreements. This, however, is another way of arguing that the agreement is unenforceable for lack of consideration.

[10]Plaintiff explains he was blacklisted by German publishers for having introduced an American competitor in the german market, for the loss of expert personnel to Ziff verlag, and for the failure of some twenty German computer magazines as a result of Ziff Verlag's entry inot the German market.

financially solvent or to have health insurance in order to care for his daughter´s medical condition. The plaintiff claims that the financial pressure created by the ddefendants´ conduct caused him so much fear and "unspeakable mental pain and anguish" that he did not voluntarily consent to the separation agreement when he signed it.

In New York, a contract executed under duress is not void but merely voidable. Nelson v. Stnley Blacker, Inc., 713 F.Supp. 107, 110 (S.D.N.Y. 1989)(citing DiRose v. PK Management Corp., 691 F.2d 628, 633-34 (2d Cir. 1982), cert denied, 461 U.S. 915 (1983)). The elements of a claim of "economic duress" are

> (1) a threat, (2) which was unlawfully made, (3) and caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative.

Kamerman v. Steinberg, 891 F.2d 424,431 (2d Cir. 1989)(citing Gulf & Western Corp. v. Craftique Prods., 523 F.Supp. 603, 610 (S.D.N.Y. 1981)). Thus, in order to prevail on a claim of duress, the plaintiff must show, inter alia, "that he had available no legal remedies to avoid duress." Nelson v. Stanley Blacker, Inc,. 713 F.Supp. 107, 110 (S.D.N.Y. 1989) (citing, inter alia, Durante Bros. and Sons, Inc. v. Flushing National Bank, 755 F.2d 239, 251 (2d Cir.) cert. denied, 473 U.S. (1985)). In addition, the plaintiff must show "that he acted promptly to repudiate the contract." Id. (citing Scientific Holding Co. v. Plessey, Inc. 510 F.2d 15, 23 (2d Cir. 1974)).

I find that no material issue of fact exists with respect to plaintiff´s claim of duress since he signed the separation agreement while he had pending lawsuits in Germany and Florida. Thus, plaintiff had legal remedies available to avoid duress. Further, the plaintiff did not act promptly to repudiate the separation agreement; he did the opposite by withdrawing his claim before the Arbeitsgericht München and by allowing his law suit to remain dormant in this Court for three years. because plaintiff´s claim of duress is legally insufficient under any set of facts, the release cannot be unenforceable on this ground. Therefore, plaintiff´s claims are barred by virtue of the release.

Finally, the plaintiff apparently alleges a cause of action for extortion under the Hobbs Act and the Travel Act, 28 U.S.C. §§ 1951, and 1952. These are criminal statutes and, with respect to the Hobbs Act, there is no private right of action. See John´s Insulation, Inc. v. Siska Const. Co., 774 F.Supp. 156 8S.D.N.Y.

1991); Peterson v. Philadelphia Stock Exchange, 717 F.Supp. 332 (E.D.Pa. 1989), aff'd 989 F.2d 488 (3d Cir. 1993). The Court has found no authority to support an implied right of action under Section 1952, and, therefore, none will be implied. Accordingly, to the extent that the plaintiff alleges a cause of action under the Hobbs Act and the Travel Act, such a claim is also dismissed for failure to state a cause of action.

CONCLUSION

For the reasons set forth above, the defendants' motion to dismiss the complaint against them is granted, and the Clerk of the Court is hereby ordered to dismiss the plaintiff's complaint with prejudice. each party will bear its own costs.

SO ORDERED:
Dated: New York, New York
November 20, 1995 s_____
Denise Cote
United States District Court

APPENDIX

Termination Agreement

by and between

1. Ziff Verlag GmbH, . . .
2. Ziff Communications Company, . . . and all its divisions and affiliated companies . . . hereinafter collectively referred to as "ZCC"

- die [sic] parties under 1. and 2. above are sometimes collectively referred to as "Ziff" -

3. Mr. Walther von Grabe . . . hereinafter referred to as "von Grabe"
4. Kahler, Bourne & Partner, . . . hereinafter referred to as "Kahler"

1. Employment relationship Ziff Verlag/von Grabe

1.1 End of Employment

Ziff Verlag and von Grabe agree that the employment relationship between them has terminated at the instigation of Ziff Verlag forthwith

1.2 Severance Pay

As a compensation for the loss of his employment, Ziff Verlag will pay to von Grabe as severance pay according to §§ 9 and 10 of the Termination of Employment Act of 1969, in combination with §§ 3, Nr. 9, 24 and 34 of the Income Tax Law an amount of DM 25.800 . . .

1.3 Information Proprietory of Ziff

Von Grabe is bound to keep strictly secret and not to disclose any internal matters or information, especially business and trade secrets, about which he learned in connection with his service for Ziff.

1.4 Ziff Property and Business Papers

Von Grabe will immediately return to Ziff Verlag any business documents (without retaining copies) and other property of Ziff.

2. Relationship between Ziff V erlag/ZCC and Kahler

Kahler claims to be entitled to head hunting fees for procuring employees for Ziff Verlag. In settlement of such fees Ziff Verlag sill [sic] effect immediate payment of DM 90,000 plus statutory VAT against submission of a proper invoice. After the above payment Kahler shall have no claims whatsoever against Ziff.

3. Relationship between ZCC (Ziff Davis Publishing Company) and von Grabe

3.1 The parties have entered into a "Beratungsvertrag" dated December 17, 1990. The compensation agreed upon in this "Beratungsvertrag" has been properly paid by ZCC and von Grabe shall have not [sic] further claims against Ziff under said "Beratungsvertrag".

3.2 Von Grabe shall return forthwith to Ziff Verlag the company car made available to von Grabe under the "Beratungsvertrag".

4. Von Grabe and Kahler shall forthwith withdraw all legal actions filed against Ziff, in particular the complaint before the Arbeitsgericht München (File No. 26 Ca 5916/91) and the comlaint filed in the USA against ZCC:

5. Overall settlement

Notwithstanding the right granted above the parties under 1./2. and the parties under 3./4. agree to waive all possible cliams [sic] which they may have against each other under any agreement or understanding whatsoever.

Munich, this 5th day of August 1991

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of May one thousand nine hundred and ninety-six,

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Walter von Grabe

Plaintiff-Appellant,

v.

Ziff Davis Publishing Company, *et al*

Defendants-Appellees.

A motion having been made herein by appellant *pro se* for leave to proceed *in forma pauperis*, upon consideration thereof, it is ordered that the said motion be and hereby is denied and the appeals is dismissed as frivolous within the meaning of 28 U.S.C. § 1915(d) see Neitzke v. Williams, 490 U.S. (1989).

s/_____
signature illegible

s/_____
signature illegible

s/_____
signature illegible

ALK RKW GC

Stamp: May 22 1996

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Georg Lange III,
Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of August one thousand nine hundred and ninety-six,

Present:

Hon. Amalya Kearse
Hon. Ralph K. Winter,
Hon. Guido Calabrese,

CIRCUIT JUDGES

Walter von Grabe
Plaintiff-Appellant,

v.

Ziff Davis Publishing Company, *et al*
Defendants-Appellees.

A Petition for Rehearing having been filed hereinby pro se Appellant Walther von Grabe

Upon consideration thereof, it is
Ordered that said motion be and hereby is DENIED

For the Court
George Lange III, Clerk

by s/_____
Beth J. Meader,
Administrative Attorney

[telefax information: +49-89-292031 BBMS MUEN - CHEN P09 22.10.90 18:05 SENDER WOLFSTEINER 49 89 597084 22.10.90 15:45 NR.05]

Stempel: Notar Dr. Wolfsteiner
Eing. 19. OKT 1990

UNTERVOLLMACHT

Hiermit bevollmächtige ich, Herr Rechtsanwalt Dr. Dirk-Reiner Martens, hier handelnd als Bevollmächtigter der Gesellschafter der Franzis-Verlag Redwood GmbH, München, eingetragen im Handelsregister des Amtsgerichts München, HRB 92283,

William Bernard Ziff, Jr.,
Dirk Edward Ziff,
Robert Davis Ziff,
Paul Morgan Stafford,
James William Stafford,
Jeffrey David Stafford,
Charles B. Seton,
und
Phillip B. Korsant

Herrn Rechtsanwalt Dr. Michael Kort, Wiedenmayerstr. 36, 8000 München 22

eine Gesellschaftervollverammlung abzuhalten und zu beschließen:

1. Die Firma der Gesellschaft wird erneut geändert und § 1 Abs. 1 der Satzung wie folgt neugefaßt:

Der Unterbevollmächtigte ist von den Beschränkungen des § 181 BGB befreit.

München, den 18. 10. 1990

/s_____
Signature illegible

TRANSLATION FROM GERMAN

(Stamp: Notary Dr. Wolfsteiener
Oct. 19. 1990)

Delegated Power of Attorney

I, attorney Dr. Dirk-Reiner Martens, having the Power of Attorney of the shareholders of the Franzis-Verlag Redwood GmbH, Munich, registered in the Commercial Registry of the Circuit Court Munich, HRB 92283, as

William B. Ziff Jr.,
Dirk Edward Ziff,
Robert David Ziff,
Paul Morgan Stafford,
James William Stafford,
Jeffrey David Stafford,
Charles B. seton,
and
Philip B. Korsant

empower Attorney Dr. Michael Kort of Wiedmayerstr. 36, 8000 München 22
to conduct a General Shareholder Meeting and to pass by formal vote:

1. The name of the corporation is changed again and and, accordingly, § 1, Section 1 of the bylaws is amended to read:
"1. The Name of the Corporation is : Ziff Verlag GmbH."
2. The General Manager Peter Emil Georg Mayer is removed from office.

The Delegate is freed from the restrictions of § 181 BGB (Bürgerliches Gesetzbuch [German Civil Code]).

Munich, October 18, 1990

s/_____
signature illegible

Walther von Grabe

3780 Clyde Morris Blvd # 308
Port Orange FL 32119-8201
Telephone 1-904-767-7201

Hon. Judge Denise L. Cote
United States District Court
Foley Square, Room 3006
New York, N.Y. 10007-9998

Port Orange, October 9, 1995

91 CIV 6275 (DLC)

Dear Judge Cote:

The question, which law applies was brought up in earlier pleadings and in response this Court has held that the time to decide which law is applicable was premature and postponed a decision on that subject matter until a later date.

Unless this Court has objections, plaintiff in this matter is seriously considering to suggest to this Court that as to claim 5 (the extortion claim), the events of which unrolled in the Federal Republic of Germany, German law should apply. While signing the alleged termination agreement under duress, Plaintiff in fact relied upon the German interpretation of the German Penal Code applicable to contracts signed as a result of extortionate behaviour (duress).

The German Penal Code (Strafgesetzbuch) covers extortion in a set of paragraphs, the exact language of which will be supplied to this Court in time in certified translations together with ample case law.

Subject to such verification the German Penal Code provides that he, who by threat of an evil obtains the Duldung or Unterlassung of an action, shall be punished by imprisonment up to one year and with a fine*.

Plaintiff is concerned that this Court may decide on applicable law without further hearing while Plaintiff in reliance upon the Courts earlier statements is inactive where he should not be.

After further research has revealed new evidence as to the RICO claims, plaintiff will ask this Court shortly to take judicial notice of two lawsuits. In or about 1985 defendants were sued by CBS (CBS, Inc. v. Ziff Communications Company) for misrepresentation of the financial conditions of certain magazines in the sale of a group of magazines to CBS.

The case was dismissed after CBS was sued by a stockholder (Minkoff v. CBS, Inc.) for having overpaid for the acquired magazines and CBS´ insurer agreed to pay to the stockholders of CBS the sum of $4.6 Mio as liquidated damges of such misreprsentations.

Plaintiff in this action will present during discovery Mr.Richard Greenfield, the attorney for Minkoff, and 12 other witnesses all of which will testify that Ziff in fact did misrepresent the financial conditions of the magazines, proving a pattern of fraud reaching from the CBS transaction to the case at hand over a period of at least 6 years.

Respectfully submitted

Walther von Grabe

*The original text of the applicable section of the German Penal Code, to the best of plaintiff´s recollection, reads as follows: "Nötigung: Wer einen anderen durch Androhung eines empfindlichen Übels zur Duldung oder Unterlassung einer Handlung zwingt, wird wegen Nötigung mit einer Haftstrafe bis zu einem Jahr oder mit Geldstrafe bestraft".

Plaintiff hereby certifies that a true and correct copy of this letter has been served upon defendants by first class mail by depositing it into the custody of the United States Postal Service this ___ day of October 1995.

Walther von Grabe

Walther von Grabe

3780 Clyde Morris Blvd # 308
Port Orange FL 32119-8201
Telephone 1-904-767-7201

Hon. Judge Denise L. Cote
United States District Court
Foley Square, Room 3006
New York, N.Y. 10007-9998

Port Orange, October 9, 1995*

91 CIV 6275 (DLC)

Dear Judge Cote:

The question, which law applies was brought up in earlier pleadings and in response this Court has held that the time to decide which law is applicable was premature and postponed a decision on that subject matter until a later date.

I am relying on the assumption that the parties will be heard on the question of choice of law.

For my case the question of applicable law is particularily relevant to the extortion issue which is more complex than may appear from the surface.

While the extortion claim as presented relies on 18 USC § 1951, the underlying issue is a common law claim of extortion, as indicated in earlier pleadings.

The German criminal law (Strafgesetzbuch, Nötigung), in a rough translation, reads: Whoever causes another by threat with an evil to tolerate action or fail to act shall be punished for coercion by imprisonment or by a fine or both.

Applicable case law comes surprisingly close to the case law under 18 USC §1951. German courts have held that the sole threat of the filing of a criminal complaint to obtain toleration of an action or to obtain an ommission of action qualifies under this section.

When the time comes, I will present a proper translation of this section and ample precedents set by the highest German court.

I will furthermore depose my counsel before the Munich Labor Court (Arbeitsgericht) who will testify that the threat to pay nothing under German labor laws if I would not release the corporate defendants from liabilities was not only made by defendants´ agent Helmut Kunkel, but was also made by defendants´ counsel in the Labor Court building in Munich.

Respectfully submitted

Walther von Grabe

Walther von Grabe

3780 Clyde Morris Blvd # 308
Port Orange FL 32119-8201
Telephone 1-904-767-7201

Hon. Judge Denise L. Cote
United States District Court
Foley Square, Room 3006
New York, N.Y. 10007-9998

Port Orange, October 12, 1995

91 CIV 6275 (DLC)

Dear Judge Cote:

I have in hand a fax of defendant´s attorneys complaining that 60 days have passed since a Motion to Dismiss has been filed by defendants.

Plaintiff understands that the issues at hand are complex in light of the possible involvement of law, foreign to the jurisdiction, including possibly German law as to the extortion issue.

At this time, however, this Court certainly has had the opportunity to determine that the complaint cannot be dismissed at the very least as to the individual defendants and under the extortion issue and the latter being open, also as to the corporate defendants.

Wherefore this Plaintiff pleads that this Court re-evaluate its earlier decision holding discovery, and that he be permitted to begin pre-trial discovery in order not to suffer from the laps of memory of the various witnesses.

A true and correct copy of this letter has been faxed this 12th day of October, 1995, and has been served upon defendants by first class mail.

Most sincerely

Walther von Grabe

*Opposite page: when using a stored letter dated October 9, 1995 the date was erroneously not changed.

Walther von Grabe

3780 Clyde Morris Blvd # 308
Port Orange FL 32119-8201
Telephone 1-904-767-7201

Hon. Judge Denise L. Cote
United States District Court
Foley Square, Room 3006
New York, N.Y. 10007-9998

Port Orange, October 9, 1995*

91 CIV 6275 (DLC)

Dear Judge Cote:

Several months ago you ordered that I should not commence pre-trial discovery until such time, as defendants´ Motion to Dismiss had been disposed off.

Please be advised that I have technically violated that order by saving evidence from destruction by demanding from the hospital Krankenhaus Rechts der Isar in Munich/Germany that a 35 mm-film, containing an Angiogram, be turned over to me for safe-keeping.

The film in question was about to be destroyed since the time limit for storage had expired. I could not wait until defendants´ Motion was disposed off since by that time the film could have been destroyed. In the meantime, it has been turned over to me.

In connection with count V of the complaint I will make a video copy or a 35 mm copy of that original film - which shows an advanced constriction of the coronaries as a result of extreme mental stress - available to defendants as soon as your order denying defendants´ Motion to Dismiss has been entered. The original film material will be made available upon demand by defendants and upon verification by the physician, who recorded the film, and who will be deposed in Munich/Germany in due course.

Most sincerely
Walther von Grabe

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

WALTER VON GRABE,

Plaintiff

- against -

ZIFF DAVIS PUBLISHING CO., ZIFF COMMUNICATIONS COM., WILLIM B. ZIFF, ROBERT D. ZIFF, JAMES W. STAFFORD, JEFFREY D. STAFFORD CHARLES B. SETON, AND PHILLIP B. KORSANT

91-CV-6275

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Preleminary Statement

Defendants Ziff Davis Publishing C., Ziff Communications Co., William B. Ziff, Jr., Dirk Edward Ziff, Robert D. Ziff, James W. Stafford, Jeffrey D. Stafford, Charles B. Seton, and Phillip B. Korsant submit this memorandum of law in support of their motion for an order dismissing the complaint.

The plaintiff Walther von Grabe, filed the instant action on June 28, 1991 but has not served any of the Defendants with a summons or a copy of the complaint. Consequently, the action should be dismissed against all of the Defendants pursuant to Rule 4(j), of the Federal Rules of Civil Procedure, because plaintiff failed to serve process within 120 days after filing a complaint.

Statement of Facts

On June 28, 1991, plaintiff Walter von Grabe (hereinaf-

ter "Von Grabe" instituted the instant action by filing a complaint. Von Grabe never served any of the Defendants with process.

On January 7, 1992, the parties to the instant action resolved their dispute by executing a settlement agreement. Despite that agreement, however, Von Grabe refused to execute a stipulation to discintinue the action.

Defendants now move this Court to dismiss the instant action pursuant to Rule 4(j) of thc federal Rules of Civil Procedure because more than 120 days have elapsed since the filing of a complaint and the Defendants´still have not been served with process.

ARGUMENT

ACTION MUST BE DISMISSED AS A RESULT OF VON GRABE´S FAILURE TO SERVE PROCESS WITHIN 120 DAY PERIOD

The instant action must be dismissed because the plaintiff failed to serve any of the Defendants with process within 120 days after he filed a complaint.

Rule 4(j) of the federal Rules of Civil Procedure provides in relevant part:

If a service of the summons and complaint is not made upon a defendant within 120 days after filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court´s own initiative with notice to such party or upon motion.

"Dismissal of an action is mandatory under Rule 4(j) when 120 day limit is violated unless good cause can be shown." Yosef v. Passamaquoddy Tribe, 876 F.2d 283, 287 (2d Cir. 1989), cert denied, 494 U.S. 1028 (1990); Hodge v. Ruperto, 739 F.Supp. 873 (S.D.N.Y. 1990); Shaw v. Rolex Watch U.S.A.., Inc. 745 F.Supp. 982 (S.D.N.Y. 1990); Delicata v. Bowen, 116 F.R.D. 564 (S.D.N.Y. 1987).

The complaint in this action was filed on June 28, 1991. as described above, however, Von Grabe has not served the summons or complaint on any of the Defendants. Von Grabe cannot demonstrate good cause why he did not serve process upon the defendants within 120 days after filing the complaint. Accordingly, pursuant to Rule 4(j), this Court must dismiss this action against all of the Defendants.

Conclusion

For the reasons set forth above, the complaint should be dismissed.

SHEA & GOULD

By: s/_____
Judith L. Bachman (4027)
Attorneys for all Defendants
1251 Avenua of the Americas
New York, New York 10020
(212) 827-3000

ARBEITSVERTRAG

zwischen

Ziff Verlag GmbH
- nachstehend "die Gesellschaft" -

und

Herrn Walter von Grabe
- nachstehend "der Mitarbeiter" -

1. Anstellung

Die Gesellschaft stellt hiermit den Mitarbeiter entsprechend den bedingungen des nachstehenden V ertrags an.

2. Aufgaben

2.1 Der Mitarbeiter wird hiermit als Produktionsleiter der deutschsprachigen Ausgabe des PC Magazine oder eines anderen von der Gesellschaft (oder einem mit ihr verbundenen Unternehmen) herausgegebenen deutschsprachigen Magazins angestellt.

Der Mitarbeiter wird seinen vertraglichen Verpflichtungen nach den Anweisungen der Geschäftsleitung und den Regeln und Grundsätzen der Gesellschaft entsprechend den nachstenden Bestimmungen dieses Vertrags nachkommen.

2.2 Der Mitarbeiter ist verpflichtet, ohne zusätzliche Vergütung auf Anweisung der Geschäftsleitung auch eine andere Aufgabe zu übernehmen, die von ihm in zumutbarer Weise erwartet werden kann und die seinen Fähigkeiten entspricht, unabhängig davon, ob diese andere Aufgabe als Vertretung eines anderen Mitarbeiters oder an einem anderen Ort erfolgt.

2.3 Der Mitarbeiter berichtet der Person, die ihm von der Geschäftsleitung jeweils benannt wird.

2.4 Die Arbeitszeit des Mitarbeiters richtet sich nach der Betriebsüblichkeit, der Mitarbeiter wird auch Überstunden - soweit notwendig - leisten.

3. Vertragsbeginn und Probezeit

3.1 Das Vertragsverhältnis beginnt spätestens am 1. Febru-

ar 1991. Es läuft für eine unbefristete Zeit, sofern es nicht wie nachstehend niedergelegt gekündigt wird.

3.2 Dieser Arbeitsvertrag kann von jeder der vertragsschließenden Parteien innerhalb der ersten sechs Monate mit einer Frist von einem Monat bis zum Ende des nachfolgenden Kalendermonats, also spätestens bis zum Ende des siebten Monats nach dem in Ziff. 3.1 festgesetzten Termin, gekündigt werden (Probezeit).

4. Beendigung

4.1 Dieser Arbeitsvertrag endet in jedem Fall unabhängig von einer Kündigung am Tag des 65. Geburtstags des Mitarbeiters.

4.2 Nach Ablauf der Probezeit kann dieses Vertragsverhältnis von jeder der Parteien mit einer Frist von sechs Wochen zum Ende eines jeden Kalenderquartals gekündigt werden. Die Kündigungsfrist verlängert sich entsprechend der gesetzlichen Regelung. Wird die Kündigungsfrist entsprechend den gestzlichen Bestimmungen verlängert, so gilt die verlängerte Kündigungsfrist sowohl für die Kündigung der Gesellschaft als auch für die Kündigung des Mitarbeiters.

4.3 Der Arbeitsvertrag kann unabhängig von seiner vereinbarten Laufzeit jederzeit von jeder der vertragsschließenden Parteien aus wichtigem Grund auch mit sofortiger Wirkung gekündigt werden.

4.4 Die Kündigung bedarf der Schriftform.

5. Vergütung

5.1 Der Mitarbeiter erhält von der Gesellschaft ein monatliches Bruttogehalt von DM 12.900,--, zahlbar jeweils am Ende eines Kalendermonats. Zusätzlich erhält der Mitarbeiter ein 13. Monatsgehalt, zahlbar zu je 1/2 mit den Gehältern für Juni und November.

5.2 Dem Mitarbeiter wird ein Firmenwagen zur Verfügung gestellt.

5.3 Mit dem Gehalt des Mitarbeiters sind auch etwaige Vergütungen für Über- und Mehrarbeit abgegolten (entsprechend Ziff. 2.4).

6. Urlaub

6.1 Der Mitarbeiter hat Anspruch auf einen Jahresurlaub

von 30 Arbeitstagen (ausgeschlossen Samstage, Sonntage und Feiertage).

6.2 Der Mitarbeiter wird seinen Urlaub, der auch in Teilen genommen werden kann, rechtzeitig mit der Geschäftsleitung abstimmen. Der Urlaub bedarf der vorherigen Zustimmung der Geschäftsleitung.

7. Nebentätigkeit

Der Mitarbeiter verpflichtet sich, seine volle Arbeitskraft ausschließlich der Gesellschaft im Rahmen der Erfüllung dieses Vertrages zur Verfügung zu stellen.

8. Unterlassung von Wettbewerb

Der Mitarbeiter ist verpflichtet, für die Dauer dieses Arbeitsvertrags weder selbständig noch für Dritte weder als Arbeitnehmer noch als freier Mitarbeiter tätig zu werden, sofern diese Tätigkeit im Wettbewerb zur Gesellschaft erfolgt.

9. Gehaltsfortzahlung

Bei Arbeitsunfähigkeit, insbesondere aufgrund von Erkrankung zahlt die Gesellschaft dem Mitarbeiter das vertragsgemäße Gehalt entsprechend Ziff. 5 für einen Zeitraum von sechs Wochen fort. Der Mitarbeiter ist verpflichtet, im Falle der Arbeitsunfähigkeit unverzüglich telefonisch der Gesellschaft Mitteilung zu machen. Im Falle einer Erkrankung wird der Mitarbeiter innerhalb von drei Tagen eine entsprechende Krankheitsmeldung vorlegen, bei fortdauernder Erkrankung jeweils rechtzeitig die Folgebescheinigungen.

10. Betriebs- und Geschäftsgeheimnisse

Der Mitarbeiter ist verpflichtet, auch nach beendigung des Arbeitsvertrages Geschäfts- und Betriebsgeheimnisse der Gesellschaft geheim zu halten und diese insbesondere nicht dritten Personen, die mit der Gesellschaft nicht verbunden sind, ohne ausdrückliche schriftliche Genehmigung der Gesellschaft zu offenbaren. Der Mitarbeiter wird dafür Sorge tragen, daß die Vertraulichkeit der Geschäfts- und Betriebsgeheimnisse allgemein gewahrt wird.

11. Geschäftspapiere

Bei beendigung dieses Arbeitsvertrages wird der Mitarbei-

ter der Gesellschaft sämtliche Geschäftspapiere herausgeben, ohne sich Kopien zu fertigen und ohne das Recht auf Zurückbehaltung.

12. Freistellung

Die Gesellschaft ist berechtigt, im Falle der Kündigung dieses Arbeitsvertrages durch eine der beiden Vertragsparteien den Mitarbeiter gegen Fortzahlung der vertragsgemäßen Vergütung von der weiteren Leistung seiner Dienste bis zum Ablauf der Kündigungsfrist freizustellen.

13. Abschließende Bestimmungen

13.1 Ergänzungen zu disem Vertrag bedürfen der Schriftform.

13.2 Sollte eine Bedingung dieses Vertrags ganz oder teilweise unwirksam sein, so berührt dies nicht die Wirksamkeit des Vertrags insgesamt. In diesem Fall ist die unwirksame Bestimmung durch eine solche zu ersetzen, die dem mit der unwirksamen Bestimmung bezweckten wirtschaftlichen Erfolg möglichst nahe kommt.

13.3 Dieser Vertrag untersteht dem Recht der Bundesrepublik Deutschland, Gerichtsstand ist München.

14. Wechsel des Arbeitgebers

Die Ziff Verlag GmbH (die Gesellschaft) ist berechtigt, sämtliche Rechte und Pflichten aus diesem Arbeitsvertrag auf eine andere Tochtergesellschaft von Ziff zu übertragen. Diese tritt dann in den Vertrag als Arbeitgeber ein.

München, den _____ 19 _____ [undated]

s/_____ s/_____

H. Kunkel Walther von Grabe

Ziff Verlag GmbH

TRANSLATION OF § 13.3 OF THE EMPLOYMENT CONTRACT (Exhibit A-40 ... 44)

13.3 This contract is subject to the Law of the Federal Republic of Germany, venue is Munich.

Petitioner hereby certifies under Rule 11, sentence 5, that he is fluent both in English and German and that the above translation is true and correct to the best of his knowledge and belief, this January 10, 1997.

Walther von Grabe

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

Walther von Grabe
c/o Nicole von Grabe
887 Sugarhouse Ct.
Port Orange, FL 32119
Plaintiff pro se
vs.
Ziff davis Publishing Company
One Park Ave
New York, New York, 10016
et al,
defendants

File # 91-412-CIV-ORL-19

Brief

Defendants in their response to the Notice of Proposed Transfer have made no allegations contradicting plaintiff´s statements in his response to the above Notice of this Court, they have neither denied that they are authorized to do business in the State of Florida and have offices in the District of this Court, nor have they asserted that the taking of depositions from witnesses residing in Europe or the submission of written interrogatories of two witnesses in New York inconveniences the parties or - in case of transfer of the case - would be conducted in any other form, less inconvenient to the defendants. And furthermore defendant´s response to the Notice of the Court has not been submitted as ordered by the Court within the period prescribed by the Court, wherefore the pleadings of defendants should not be taken into consideration.

This 29th day of July 1991

s/_____
Walther von Grabe